lien, which is claimed by the appellee upon real estate in the hands of the appellant, a trustee in bankruptcy.

The bankrupt is the New England Breeders' Club.

The property at stake is real estate situate at Salem, New Hampshire.

The appellee is the Head & Dowst Company of Manchester, New Hampshire.

The main question is whether the property of the New England Breeders' Club shall be divided ratably among the creditors of the club, or shall be turned over to the Head & Dowst Company, to the exclusion of the general creditors.

In the fall of 1906 the New England Breeders' Club (hereinafter called *the Club*) was hopelessly insolvent (Record, p. 30).

On Dec. 24, 1906, the Head & Dowst Company (hereinafter called *the Dowst Co.*) brought suit against the Club, under the New Hampshire Statutes (N. H. Pub. Stats., c. 141, ss. 10, 16, 17), to secure and enforce its claim for a lien for labor performed and materials furnished, the action being returnable in the Superior Court for the county of Hillsborough at the May Term, 1907; and on said Dec. 24, 1906, all the real estate of the Club in Salem, N. H., was attached for the purpose of securing and enforcing said lien claim (p. 32).

On April 15, 1907, the Club had been decreed insolvent by the Probate Court of Rockingham County, N. H., and N. W. Hobbs was appointed assignee in insolvency under the State statute (p. 32).

The Dowst Co. entered its suit at the May Term, 1907, of the Superior Court, and Eastman, Scammon & Gardner entered their appearance in that court for N. W. Hobbs, the assignee (p. 32).

An involuntary petition in bankruptcy was filed in the

United States District Court on April 19, 1907 (p. 32), within four months of the attachment made by the Dowst Co. (Dec. 24, 1906).

The lien suit of the Dowst Co., was tried in the State Court by Honorable R. J. Peaslee, presiding justice, without a jury, on Dec. 6, 1907 (p. 33). Before the trial was commenced, counsel for the assignee in insolvency informed Judge Peaslee orally that a petition in bankruptcy against the Club was pending in the United States District Court; but the presiding justice proceeded with the trial, and at the conclusion of the trial ordered judgment *in rem* against all the real estate of the Club in the sum of $46,748.08 (p. 33).

Subsequently, on December 31, 1907, the Club was adjudicated a bankrupt in the United States District Court on the petition of April 19, 1907, and N. W. Hobbs, then acting as assignee in insolvency, was appointed trustee in bankruptcy, and qualified as such on Feb. 8, 1908. On Feb. 10, 1908, Mr. Hobbs, the assignee, turned over to himself, as trustee, all property of the Club then in his possession (p. 32).

As a consequence of certain exceptions taken by the assignee in insolvency at the trial before Judge Peaslee, a case was drawn in accordance with the practice of the State Courts, and the action was transferred to the New Hampshire Supreme Court (the law court) on Feb. 3, 1908. Henry F. Hollis and Eastman, Scammon & Gardner appeared for the assignee in insolvency and they filed a brief in his behalf on April 7, 1908 (p. 33).

When the case came on for argument in the New Hampshire Supreme Court, counsel filing the brief stated that the defendants did not appear and that the assignee in insolvency had surrendered the property to a trustee appointed in proceedings in bankruptcy in the Federal Court

and had been discharged as assignee. In this situation the New Hampshire Supreme Court declined to consider the exceptions until the bankruptcy proceeding should be dismissed or the trustee in bankruptcy be made a party. The Dowst Co. then obtained and served upon the trustee in bankruptcy an order notifying him of the pendency of the proceedings, but the trustee declined to appear, and the exceptions were overruled without consideration (pp. 34, 35).

On May 15, 1908, the trustee in bankruptcy obtained a temporary order from the United States District Court restraining the Dowst Co., its agents, etc., from taking any further action in the State Courts. This temporary restraining order has never been dissolved (pp. 37, 38).

On June 10, 1908, the trustee filed the petition upon which the decree under consideration is based, asking that the alleged lien be adjudicated in the Federal Court (p. 38). On April 29, 1909, this petition of the trustee and the Dowst Company's motion to dissolve the restraining order came on for hearing in the United States District Court, and Burns P. Hodgman was appointed Master to find and report the facts (p. 41).

The Master filed his report on Dec. 6, 1909 (p. 12), reporting the foregoing facts and stating that "in the original suit in the Superior Court counsel for the assignee failed to move at the conclusion of the evidence for a nonsuit or for a directed verdict, so that the primary exceptions of the assignee, which relate to the verdict found on the evidence and the judgment ordered in accordance therewith, are apparently worthless under recent decisions of the New Hampshire Supreme Court" (p. 43).

On Jan. 6, 1910, Judge Aldrich of the United States District Court, after a hearing on the trustee's petition to have the Dowst Co. lien adjudicated in the District

Court, "contrary to impressions tentatively expressed at the oral arguments," reached the conclusion that he "ought to deny the application at this stage of the proceedings, to adjudicate here the *Head & Dowst* claim, and decline to continue the injunction in its present form" (p. 46).

The opinion concluded with the following:

> "Let the order be: The injunction is so far modified as to permit the *Head & Dowst Company* to go before the proper court of New Hampshire, and take necessary steps to have all questions relating to the amount and validity of the alleged lien upon the bankrupt estate of the New England Breeders' Club determined *upon their merits* under the New Hampshire law; and the trustee in bankruptcy has leave, and is directed, to make all reasonable effort in the direction of having such questions established by that court. The motion of the trustee that the lien claim be adjudicated by this court is stayed for the present, and will await the result reached in the State Court" (p. 50).

Counsel for the Trustee thereupon appeared before the Supreme Court of New Hampshire on Feb. 1, 1910, and moved that the order "exceptions overruled" be stricken off (p. 56). He further stated that, in his opinion, the reserved case as sent up by Judge Peaslee did not contain sufficient findings of facts, or rulings of law, to enable the New Hampshire Supreme Court to decide the questions involved *upon their merits;* that it was claimed by plaintiff's counsel that the defendant's counsel failed to make the proper motions and take the necessary exceptions to raise the real legal questions for the decision of the New Hampshire Supreme Court; that Judge Peaslee had transferred all the evidence, stating that upon the evidence he had found for the plaintiffs and ordered a judgment *in rem* against the property, and that the defendants excepted to the ver-

dict and to the judgment *in rem*. He further moved that the case be recommitted to the New Hampshire Superior Court for findings of fact and rulings of law, which would present to the New Hampshire Supreme Court the legal questions involved. Counsel for the Dowst Co. refused to assent to such recommittal (pp. 56, 57).

The New Hampshire Supreme Court on Feb. 8, 1909, permitted counsel to argue the questions raised by the reserved case and the motion to recommit (p. 57).

On March 1, 1910, the New Hampshire Supreme Court rendered an opinion upon the original reserved case, to the effect that the defendants had failed to make the proper motions to raise the legal questions involved in the lien controversy, so that they "take nothing by this exception" (p. 52), and that "*the questions which the defendants seek to raise relating to the validity of the lien are eliminated*" (p. 52).

This decision was called to the attention of the United States District Court by the trustee by motion on March 15, 1910 (pp. 50, 51), and on March 19, 1910, the Honorable District Court delivered an opinion to the effect that the result reached by the State court was accepted as conclusive upon the amount and validity of the *Head & Dowst Company* lien, and entered a decree dismissing the petition of the Trustee that the lien be adjudicated in the United States District Court (p. 58).

The result is that through the omission of counsel, who did not represent the bankrupt estate in the New Hampshire Superior Court, the questions of law upon which the validity of the Dowst Co. lien depends, have never been considered in any court of last resort. A single judge, sitting at *nisi prius*, rendered a verdict against the Club, and ordered a judgment *in rem* against property which was even then, in the theory of the law, in the custody of the Federal Court.

Specification of Errors.

The Assignment of Errors is printed on pages 80 and 81 of the Record. It follows, in arrangement, the opinion delivered in the Honorable Circuit Court of Appeals. The various errors assigned fall naturally into four groups:

1. The main question,—validity of mechanics' lien.

2. The jurisdictional question,—binding effect of proceedings in State courts.

3. The general equities,—the extent to which the real merits have been adjudicated.

4. The technical question,—form of the decree.

Rearranging the errors assigned, we present the following

Specification of Errors.

The United States Circuit Court of Appeals for the First Circuit erred:

(Validity of Lien.)

First. In failing to adjudicate that the alleged mechanics' lien claimed by said appellee upon the real estate in the possession of said appellant as a trustee in bankruptcy, was invalid. 2.

Second. In holding upon the record presented that said appellee was entitled to proceed on the contract for the entire amount of work done by it, and to maintain its statutory lien for whatever remained unpaid. 6.

Third. In holding that there is no claim that said appellee was in any way in default, nor any claim that the proper certificates from the architect would not be given at the proper time or times provided in the contract. 12.

Fourth. In holding that except for the matter of one thousand dollars for shutters and also for the absence of the architect's certificates the whole amount reserved by the

contract was due and payable at the time the lien suit was brought. 17.

Fifth. In attempting to apply to the case at bar, involving a partially completed building contract, the rule enounced concerning a contract for the future delivery of personal property in *Roehm* v. *Horst*, 178 U. S. 1. 11.

(Jurisdictional Questions.)

Sixth. In holding that the involuntary petition in bankruptcy was filed more than four months after the lien suit was commenced. 13.

Seventh. In holding that the adjudication as to said alleged mechanics' lien in said State Courts, could not be disturbed. 5.

Eighth. In failing to hold that said District Court and said Circuit Court of Appeals have authority to determine upon their merits the validity and amount of mechanics' liens claimed upon the real estate in the possession of a Trustee in Bankruptcy. 9.

Ninth. In accepting the results reached in the State Courts of New Hampshire as in any way affecting or binding said United States Courts. 10.

Tenth. In holding upon the record presented that said appellee was entitled to proceed in the State Courts to enforce said alleged mechanics' lien against the real estate in the possession of said appellant as a Trustee in Bankruptcy. 3.

(General Equities.)

Eleventh. In holding that the Supreme Court of New Hampshire held that all the facts essential to the creation and preservation of the lien had been found for the appellee in the New Hampshire Superior Court. 15.

Twelfth. In holding that the trial in the State Courts

was properly conducted and a full defence made by the assignee in insolvency. 14.

Thirteenth. In holding that the amount and validity of appellee's alleged lien has been passed upon by the State Courts upon its merits. 16.

Fourteenth. In holding that, neither as to the State Superior Court, nor the State Supreme Court, can it be said that the result came from any substantial default. 18.

Fifteenth. In holding that a full, complete and impartial trial was had in the State Courts. 19.

(Technical Questions.)

Sixteenth. In attempting to pass upon the merits of said alleged mechanics' lien, upon the record presented. 8.

Seventeenth. In affirming the decree of the United States District Court for the District of New Hampshire. 1.

Eighteenth. In failing to adjudicate that a permanent injunction should issue against said appellee to prevent the enforcement of said alleged mechanics' lien in the Courts of the State of New Hampshire. 4.

Nineteenth. In failing to remand said cause to said District Court for an adjudication of said alleged mechanics' lien upon its merits. 7.

Twentieth. In holding that said appellee was substantially entitled to the judgment for the lien claim which it obtained in the State Court.

General Legal Position.

The Dowst Company seeks to enforce in the State Courts of New Hampshire an alleged mechanics' lien to the amount of $45,995.02, with interest.

It seeks to enforce this lien against the real estate in the hands of a trustee in bankruptcy (appellant), and hence in the custody of the United States District Court.

It is our position that a creditor (even a preferred creditor) may not proceed against property in the custody of the Federal Court, except by a proceeding in that Federal Court. To state it broadly, when a United States Court takes into its custody real property of a bankrupt, it takes to itself the final disposition of that property and apportions it, or the proceeds thereof, among those who are justly entitled to it; it passes upon all claims against the property, including mortgages, attachments, pledges and liens.

In the present case, the Dowst Company commenced its suit to enforce its lien on Dec. 24, 1906 (Record, p. 32), in the New Hampshire Superior Court. This was before bankruptcy proceedings were begun, and it was entirely proper that the suit should be brought, to preserve the Dowst Company's rights.

But before four months had expired, on April 19, 1907, proceedings in bankruptcy were begun against the Breeders' Club, upon which a decree was entered December 31, 1907, and under which the trustee in bankruptcy took physical possession of the property February 10, 1908.

It is our position that it thereupon became the duty of the United States Courts to pass upon all alleged claims, mortgages and liens against the property, to the exclusion of any other court, and to enjoin the Dowst Company from proceedings against the property in the New Hampshire courts. A petition for an injunction was brought to invoke this jurisdiction and authority of the Federal Courts in this regard on April 14, 1908 (p. 35). We are here to maintain that jurisdiction and authority, and to invoke its exercise in this proceeding.

We concede that a trial of the facts was had in the Superior Court of New Hampshire, December 6, 1907, twenty-five days before the Club was adjudicated a bankrupt, but this was nearly eight months after the petition in bankruptcy was filed, April 19, 1907 (pp. 32, 33).

If there had been a fair trial upon the merits, so that a New Hampshire court of last resort had passed upon the questions of law and fact involved, we should expect some reluctance upon the part of this Honorable Court to disregard the proceedings of the New Hampshire court. When a litigant has had "his day in court," when his rights have been fairly passed upon by a court of competent jurisdiction, we may expect this court, in most instances, to accept the result so reached.

But in the present case a judgment has been entered against property in the custody of the Federal Court, *without a consideration of the merits of the case* upon a mere technicality, based upon a lawyer's blunder. This court is asked to permit a judgment so obtained to be executed against the property of the bankrupt.

And the lawyer's blunder, which resulted in this miscarriage of justice, was made before the trustee in bankruptcy appeared in the suit, and even before the adjudication in bankruptcy was made. The suit was tried and the blunder was made December 6, 1907, and the adjudication in bankruptcy was made Dec. 31, 1907 (pp. 32, 33, 43, 51, 52).

The blunder was a failure on the part of counsel to enter a technical motion in the New Hampshire Superior Court for a non-suit or a directed verdict before the case was submitted to the trial judge for a decision (p. 51). As a result of this mistake or omission of counsel for the assignee (not the trustee in bankruptcy), the New Hampshire Supreme Court refused to pass upon the material issues, the case went off on a technicality, and the primary exceptions were lost (pp. 52, 43).

There can be, therefore, no equitable ground for claiming that this trustee in bankruptcy ought to be concluded by a blunder to which he was in no sense a party.

We respectfully pray that the case be remanded to the District Court for a trial on the *merits* of the alleged lien.

We feel, however, that we should first show to this Honorable Court that there is at least reasonable ground to believe that the lien would be disallowed upon a fair trial of the merits. We proceed, therefore, to a discussion of the main question, to a discussion of the merits, to a consideration of the validity of the alleged lien.

First Point.

The Main Question,—The Validity of the Mechanics' Lien.

Enough facts appear in the record to show conclusively that the alleged lien has no legal standing. To that point we now call the attention of the court.

1.

The Statute.

It appears (p. 51) that the Dowst Company seeks to bring its suit in the State Court within the terms of the New Hampshire Statute on builders' liens, which is as follows:

> "Sect. 10. If a person shall, by himself or others, perform labor or furnish materials to the amount of fifteen dollars or more, for erecting, altering, or repairing a house or other buildings or appurtenances, by virtue of a contract with the owner thereof, he shall have a lien thereon and on any right of the owner to the lot of land on which the house, building, or appurtenances stand.
>
> "Sect. 16. The lien created by sections ten, eleven, twelve, thirteen, and fourteen of this chapter, shall continue for ninety days after the services are performed, or the materials or supplies are furnished, unless payment therefor is previously made, and shall take precedence of all prior claims except liens on account of taxes.
>
> "Sect. 17. Any such lien may be secured by attach-

ment of the property upon which it exists at any time while the lien continues,—the writ and return thereon distinctly expressing that purpose; and such attachment shall have precedence of all other attachments made after such lien accrued, unless founded on a prior lien."

N. H Pub. Stats., *c.* 141, *ss.* 10, 16 and 17.

We concede that the Dowst Company erected certain buildings for the Breeders' Club by virtue of a certain entire contract; and that within ninety days of performing their last work upon said buildings, they brought suit, based upon said contract, and made a special attachment under the provisions of the aforesaid statute.

We maintain, however, that they are not entitled to a mechanics' lien in said suit because

1. They deliberately, wilfully, and without legal excuse, failed to complete their contract;

2. Nothing is due and payable under said contract;

3. The contract is entire, no way is provided to apportion non-lienable items, and hence there is no lien for the lienable items.

2.

NEW HAMPSHIRE DECISIONS.

For the convenience of the court we furnish the following list of all the mechanics' lien cases which we find reported in New Hampshire:

Jacobs v. *Knapp*, 50 N. H., 71;
Bryant v. *Warren*, 51 N. H., 213;
Cheshire Prov. Ins. v. *Stone*, 52 N. H., 365;
Cole v. *Colby*, 57 N. H. 98;
Freeto v. *Houghton*, 58 N. H., 100;
Hill v. *Callahan*, 58 N. H., 497;
Hale v. *Brown*, 59 N. H., 551;
Eastman v. *Newman*, 59 N. H., 581;

Marston v. *Stickney*, 60 N. H., 112;
Foote v. *Scott*, 60 N. H., 469;
Pike v. *Scott*, 60 N. H., 469;
Hodgdon v. *Darling*, 61 N. H., 582;
Pitman v. *Thompson*, 63 N. H., 73;
Thompson Mfg. Co. v. *Smith*, 67 N. H., 409,
Kendall v. *Pickard*, 67 N. H., 470;
Quimby v. *Williams*, 67 N. H., 489;
Lawson v. *Kimball*, 68 N. H., 549;
Wason v. *Martel*, 68 N. H., 560;
Lavoie v. *Burke*, 69 N. H., 144;
Grafton Co. v. *Company*, 69 N. H., 177
Perrault v. *Shaw*, 69 N. H., 180;
Cudworth v. *Bostwick*, 69 N. H., 536;
Bixby v. *Whitcomb*, 69 N. H., 646;
Russell v. *Howell*, 74 N. H., 551;

3.

STRICT COMPLIANCE WITH STATUTE.

We have no concern with the equities of the case, or with the humane intentions of the Master.

It is established beyond controversy that a mechanics' lien is a creature of the statute, and can only be obtained by a strict compliance with the letter of the law.

Marston v. *Stickney*, 55 N. H., 383, 385;
Jacobs v. *Knapp*, 50 N. H., 71, 80;
Bicknell v. *Trickey*, 34 Me., 273, 281;
Trask v. *Searle*, 121 Mass., 229, 230;
Gale v. *Blaikie*, 129 Mass., 206, 209;
Wendell v. Abbott, 43 N. H., 68, 73;
Ellis v. *Lull*, 45 N. H., 419, 420;
Pierce v. *Cabot*, 159 Mass., 202;
Street Lumber Co. v. *Sullivan*, 87 N. E. (Mass.) 905;
General Fire Extinguisher Co. v. *Chaplin*, 183 Mass., 375, 378;
Grainger & Co. v. *Riley*, 201 Fed. (C. C. A. 6), 901, 903.

Street Lumber Co. v. *Sullivan*, 201 Mass., 484, 485;
Whalen v. *Collins* 164 Mass., 146, 150;
Am. & Eng. Ency. Law., 2d ed., 20; 269-71, 277;
27 Cyc., 20.

"This argument rests upon a misconception as to the nature and character of a mechanics' lien. This lien is a creature of the statute, and was not recognized at common law."

Van Stone v. *Company*, 142 U. S., 128, 136.

4.

MUST BE BASED ON EXPRESS CONTRACT WITH OWNER.

Under the New Hampshire and similar statutes, it is uniformly held that the lien suit must be based upon *an express contract* with the owner, in existence when the service is performed. It cannot be based upon a *quantum meruit*, or *implied assumpsit*.

Copeland v. *Kehoe*, 67 Ala., 594;
Rowley v. *James*, 31 Ill., 298;
Parker v. *Anthony*, 4 Gray, 289, 290;
Sanderson v. *Taft*, 6 Gray, 533;
Sly v. *Pattee*, 58 N. H., 102;
Pike v. *Scott*, 60 N. H., 469, 471;
Marston v. *Stickney*, 60 N. H., 112, 113;
Jacobs v. *Knapp*, 50 N. H., 71, 78;
Dressel v. *French*, 7 How. Pr. (N. Y.), 350;
Ellenwood v. *Burgess*, 144 Mass., 534.

The point need not be argued, however, for the present proceeding is found to be based upon the original contract, with subsequent additions and deductions (Record, p. 32).

5.

Contract Must Have Been Performed.

However the authorities may differ upon the question whether a lien may be created upon an implied contract, they all agree that, *in case there is an express contract,* there can be no lien unless the claimant show one of three things:

1. That he has performed the contract:

Rochford v. *Rochford,* 192 Mass., 231, 232;
General Fire Extinguisher Co. v. *Chaplin* 183 Mass., 375;
Rome Hotel Co. v. *Warlick,* 87 Ga., 34;
Thomas v. *University,* 71 Ill., 310;
Bohem v. *Seabury,* 141 Pa. St., 594;
Moritz v. *Larsen,* 70 Wis., 569;
Company v. *Berghoefer,* 103 Wis., 359;
Cahill v. *Heuser,* 2 N. Y. App. Div., 292;
Paturzo v. *Shuldiner,* 110 N. Y. S. (App. Div.) 137;
Gunther v. *Bennett,* 72 Md., 384;
Brick Co. v. *Spilman,* 76 Md., 337;
Derrickson v. *Edwards,* 29 N. J. Law (5 Dutch.), 468;
McGraw v. *Godfrey* 16 Abb. Prac. (N. S.) (N. Y.) 358;

or 2. That he has been *prevented* from doing so by the other party:

Howes v. *Reliance Wire-Works Co.,* 46 Minn., 44.
Knight v. *Norris,* 13 Minn., 473;
Dennistoun v. *McAllister,* 4 E. D. Smith (N. Y.) 729;
Kenney v. *Sherman,* 28 Ill., 520, 523;
Charnley v. *Honig* 74 Wis., 163;
Hutchins v. *Bautch,* 123 Wis., 394;

Catlin v. *Douglas*, 33 Fed. (C. C., D. Kans.), 569;
Sproessig v. *Keutel*, 17 N. Y. Supp., 839;

or 3. That performance has been waived:

Cahill v. *Heuser* 2 N. Y. App. Div., 292;
Floyd v. *Rathledge*, 41 Ill. App., 370;
McCue v. *Whitwell*, 156 Mass., 205;
Stewart v. *McQuaide*, 48 Pa. St., 191;
Am. & Eng. Ency. Law (2d ed.), 20; 366.

That performance of the contract is essential to the maintenance of a mechanics' lien is everywhere recognized. Reference to a single case is all that is necessary, and we select from the list *Extinguisher Company* v. *Herman W. Chaplin, Trustee*, 183 Mass., 375.

In that case, proceedings were begun to enforce the lien when all of an eleven thousand dollar contract had been completed except work to the amount of seventy dollars, and this was completed before the suit was tried. It was held, however, that the lien must fail for the reason that the entire contract must have been completed before the lien proceedings were instituted.

This case is very strong authority for our contention.

Company v. *Chaplin, Trustee*, 183 Mass., 375.

To the same effect are *Hains* v. *Graham & Bordley*, 111 S. W. (Ark.), 984, 986; *Pippy* v. *Winslow*, 125 Pac. (Or.), 298; *Klaub* v. *Vokoun*, 169 Ill. App., 434; *Evans* v. *Woodley*, 138 N. W. (Mich.) 275, and *Rochford* v. *Rochford*, 192 Mass., 231.

The Master has found (p. 30) that the Dowst Company wilfully failed to complete the shutters, at an estimated expense of $1,000 and (p. 32) that damage to the amount of $1,000 has been done on account of this failure.

It does not appear that the completion of the contract was *prevented* (although it was somewhat *delayed*) by the Breeders' Club.

It does not appear that performance of the contract was waived.

The only excuse for the failure to complete the contract is found by the Master as follows:

> "And so far as it is a question of fact, I find that the refusal on the part of the Breeders' Club to make its payments under the contract, constituted such a breach of the contract on its part as to entirely warrant the Head & Dowst Company in abandoning further work under the contract and from proceeding further with the construction work."
>
> Record, p. 30.

Whether the Breeders' Club failed to make its payments under the contract, and if it did, whether such breach constituted a legal excuse for the Dowst Company to abandon its work under the contract, are important questions of law in this case.

6.

BREACH BY ONE PARTY IS NO EXCUSE FOR FAILURE TO PERFORM BY THE OTHER PARTY.

Even if payments had become due under the contract, and had been refused by the Club, that would not have warranted the Dowst Company in abandoning further work under the contract and leaving it uncompleted.

It is elementary that failure to make payments under a contract, as the work progresses, does not entitle the contractor to abandon the work and sue under the contract, unless payment of the money is made a condition precedent to the completion of the work under the express terms of the contract.

There is no such condition in the contract in this case (pp. 19-25).

In one case where the validity of a mechanics' lien was in question, it was held that failure to pay an installment by one party was no excuse for abandoning the contract by the other. A quotation from the case follows:

> "It is the rule in this State that the mere fact that money which is to be paid as fast as the work progresses, is not paid by the owner when, by the terms of the contract, it ought to be, will not authorize the abandonment of the work and the recovery of a mechanics' lien for the work performed by the contractor unless the payments are made conditions precedent to the performance of the work by the express and positive provisions of the contract. . . . The failure to pay an installment when due is not such an act or omission as will prevent the other party from completing the contract. In order to obtain a lien the contractor must show that he has performed his contract, or that he has been prevented from so doing by the act of the other party."
>
> *Geary* v. *Bangs*, 33 Ill. App. 582-4-5.

> "In *Palm* and *Robertson* v. *R. R. Co.* 18 Ill. 217, 220, the court said they found no case where the failure to pay as the work progressed, according to the terms of the agreement, had been held such an act or omission on the part of the defendant as to prevent the other party from completing the contract. The payments should be made a condition precedent, by the express and positive provisions of the contract. They have not been so made by this contract. The petitioner, having abandoned the contract, appeals with a bad grace, for a preference by lien over all other creditors."
>
> *Kenney* v. *Sherman*, 28 Ill., 520, 523.

In considering generally the question whether or not the failure of one to pay an installment excuses non-perform-

ance in the other, the fact plainly appears that the best authorities in the country support the theory that such a failure is no excuse.

In the case of *West* v. *Bechtel*, 125 Mich., 144, all the English and American authorities are discussed, and the court reaches the conclusion that mere failure to pay one installment was not alone ground for abandoning the contract.

A case holding likewise is:

Winchester v. *Newton*, 2 Allen (Mass.) 492.

> "It seems to be settled, that where a person has received a part of the consideration for which he has undertaken to do some act, he cannot excuse himself for not performing it because he has not received the whole, unless it clearly appears that the payment of the whole consideration was a condition precedent to the performance."
>
> *Dox* v. *Dey*, 3 Wend. (N. Y.) 356, 361.

> "Where a contractor, acting in good faith, removes his men and tools, believing that he has fully completed his contract, but in fact slight omissions are found, which may be readily supplied or remedied, the liberal and just rule of substantial performance obtains in equity, and he may recover, a proper reduction from the contract price being made to indemnify the owner. . . . But we are of the opinion that the rule should not be applied with the same liberality in a case where, as here, the contractor deliberately abandons the work, without any pretense of having fully completed his contract, and solely on account of the failure of the owner to pay an installment intermediate the commencement and completion of the work."
>
> *M'Grath* v. *Horgan*, 76 N. Y. S. (App. Div.) 412, 415.

> "The plaintiff alleged in his petition that the coal company was released from all obligation to ship more

cars of coal than it did, for the reason that defendants failed to pay for the coal shipped within the time and in the manner provided by the contract. He now complains of rulings of the court which excluded evidence offered to sustain that issue. We discover no error in these rulings. The agreement provided for the payment for each shipment thirty days after it was made. The alleged breach did not go to the whole consideration of the contract, and the coal company did not, therefore, have the power to rescind the contract."

Osgood v. *Bauder*, 75 Iowa 550, 558;
Myer v. *Wheeler*, 65 Iowa 390;
Hanson v. *Heating Co.*, 73 Iowa 79.

"If the omissions are so substantial that the contractor would not have a right of recovery upon his contract, he cannot enforce a lien therefor."

Bianchi v. *Hughes*, 124 Cal., 24, 27.

"A mere default in payment of an installment, if not coupled with facts showing an intent on the part of the party in default to renounce his liability under the contract, does not operate as a discharge of the adversary party."

3 Page, Contracts, *s.* 1490 (7);
Mersey Co. v. *Naylor*, 9 App. Cas. (House of Lords) 434, supports this theory.
Also, *Cox* v. *McLaughlin*, 54 Cal. 605.

Canada has also accepted the general doctrine expressed on the subject.

Campbell v. *McLeod*, 24 Nova Scotia 66.

Chief Justice Shaw furnishes an interesting discussion as to when a condition is or is not one precedent, the nonperformance of which by one party will furnish excuse for the abandonment of the contract by the other party, in *Mill Dam Foundry* v. *Hovey*, 21 Pick. (Mass.) 417, 435, where at the trial he instructed the jury "that the advancement of

money, from time to time, to pay the defendant's workmen, was not a condition precedent on the performance of which the defendant was absolved from performance on his part," and at page 437 in the opinion said:

> "It seems to be well settled, that when there is a stipulation amounting to a condition precedent, the failure of one party to perform such condition, will excuse the other party from all further performance of stipulations depending upon such prior performance. But a failure to perform an independent stipulation, not amounting to a condition precedent, though it subject the party failing to damages, does not excuse the party on the other side from the performance of all stipulations on his part."

In order that a condition may be construed to be precedent, Judge Shaw says (*p.* 438) that it must appear, either

> "1. That the undertaking on one side, is *in terms* a condition to the stipulation on the other; as where one stipulates that he will perform the thing to be done, if the other shall have first performed some stipulation on his part; and even when words are used, which might be construed to be a condition in their ordinary sense, they shall not be so considered, if such construction is not consistent with the intent of the parties. . . . Or,
>
> "2. It must result from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance. When the act of the one party must necessarily precede any act of the other, as where one stipulates to manufacture an article from materials to be furnished by the other, and the other stipulates to furnish the materials, the act of furnishing the materials necessarily precedes the act of manufacturing, and will constitute a condition precedent, without express words.

. . . But when the act of the one is not necessary to the act of the other, though it would be convenient, useful or beneficial, yet as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, the performance of the one is not a condition to the obligation to perform by the other: or,

"3 The non-performance on one side must go to the entire substance of the contract, and to the whole consideration, so that it may be safely inferred as the intent and just construction of the contract, that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other side. And therefore though there be a breach of an express or implied covenant on one side, attended with some loss and damage to the other, yet if it does not go to the whole consideration, and the loss can be compensated in damages, the stipulation must be construed to be independent, for breach of which the party sustaining such loss has his remedy by action, but it is not a condition precedent, upon the non performance of which the other party is absolved from the performance of the conditions on his part."

Mill Dam Foundry v. *Hovey*, 21 Pick. (Mass.) 417, 435, 437.

Quotations from cases bearing on the main heading of the present section which amply support the trustee's contention are now given.

"A breach of a covenant which does not go to the whole consideration of the contract, but is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract, does not authorize the injured party to rescind the agreement, but he is still bound to perform his part of it, and his only remedy is a recovery of damages for the breach. . . . And when a contract has been partially executed, and one of the parties has derived substantial benefits, or

has imposed upon the other material losses through the latter's partial performance of the agreement, then the first party cannot rescind the contract on account of the failure of the second party to complete his performance; but the agreement must stand, the first party must perform his part of it, and his only remedy for the failure of the second party to completely perform is compensation for the breach."

Howe v. *Howe & Owen Co.*, 154 Fed. (C. C. A. 8th Cir.) 820, 826, (Opinion by Sanborn, J.);

Kauffman v. *Raeder*, 108 Fed. (C. C. A. 8th Cir.) 171, 181.

"The defendant agreed in the written contract that he would keep the building insured for his and the contractor's benefit as it progressed against damage by 'fire, lightning, earthquake, cyclones or other casualty,' but he only insured it against fire. . . . It would seem that the failure to insure would not be a ground for quitting; it was not a condition precedent."

Paturzo v. *Shuldiner*, 110 N. Y. S. (App. Div.) 137, 139.

"Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they only go to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent."

Boon v. *Eyre*, 1 H. Bl. 273 (Lord Mansfield).

7.

INSOLVENCY OF ONE PARTY IS NO EXCUSE FOR ABANDONING WORK BY THE OTHER PARTY.

The insolvency of the owner constitutes no legal excuse for abandoning the work under the contract. If the contract is rescinded or terminated, of course neither party can recover under it. A party who refuses to complete the con-

tract cannot recover under it. If he thinks he cannot collect when the contract is completed, he may stop work and recover under a *quantum meruit*. But if he wishes to enforce his lien, he must complete his contract, and bring suit under its terms.

Wherever the question has been directly raised, whether insolvency furnishes an excuse for the abandonment of a contract, a negative answer has always been given. And this rule has been applied as against either party who desired to abandon, whether the solvent or the insolvent. It prevails in England, Massachusetts, New Hampshire, New York, Illinois, Missouri and West Virginia. The latest case considering the point was decided in New York, a quotation from which follows:

> "Ordinarily the insolvency of a party to an executory contract of sale is not equivalent to a breach. *Pardee* v. *Kanady*, 100 N. Y. 121; *Vandegrift* v. *Cowles Eng. Co.*, 161 N. Y. 435. . . . I do not think that the bankruptcy of the defendants was necessarily to be considered as equivalent to a renunciation by them of the contract, or to a repudiation of their ability to perform."
>
> *Phenix Nat. Bank* v. *Waterbury*, 90 N. E. 435, 437, 197 N. Y. 161.

The Court of New Hampshire wherein the present case arose has placed its stamp of approval on the general proposition. In the particular case considering it, an insurance policy provided that if it were cancelled by the company the policyholder would be entitled to a *pro rata* part of the premium, and if cancelled by him, to the customary short rates.

The following question was submitted to the Supreme Court:

> "Shall policies surrendered by the insured before the appointment of the receiver in consequence of reports

of the probable insolvency of the company be cancelled *pro rata* or at short rates?"

By the Court, *Chase, J.* "The motive that has induced policy-holders to terminate their agreements is immaterial. The substance of the policies on this point, as stated in the case, is that the company could terminate the contracts 'on giving reasonable notice and paying a *pro rata* amount;' and that the insured could terminate them by request. The insolvency of the company, or a fear of its insolvency, or the appointment of a receiver, might be a reason which the insured would consider sufficient to act upon in exercising their right of terminating the contract. But they could terminate them without any reason. The insolvency or financial embarrassment of the company, operating as a moral compulsion upon the insured and forcing them to surrender their policies for the protection of their interests, would not alter the fact that the contracts were terminated by them and not by the company."

Ins. Com. v. *Ins. Co.*, 68 N. H., 51, 52, 54.

And in still another case the same court said:

"The insolvency proceedings did not revoke the defendant's contracts with the trustees, nor excuse the defendants from performing them."

Bank Comm'rs v. *Trust Co.*, 69 N. H. 621, 623.

In New York the point has been considered more often than anywhere else and the courts of that State have always maintained that insolvency of one party furnishes the other with no ground for abandonment of the contract.

N. E. Iron Co. v. *Gilbert E. R. R.*, 91 N. Y. 153;
Devlin v. *Mayor*, 63 N. Y. 8;
Merchant v. *Rawson*, 1 Clarke, Ch. (N. Y.) 123;
Underhill v. *North Am. Co.*, 31 How. Prac. (N. Y.) 34;
In re Carter, 47 N. Y. S. 383.

"The fact that the plaintiffs became insolvent after entering into the contract would not of itself have terminated the contract."

Hobbs v. *Columbia, etc., Co.*, 157 Mass. 109, 112;
Jewett Pub. Co. v. *Butler*, 159 Mass. 517, 520.

"It is not and cannot be disputed that the law is that, where a contract has been entered into between two parties, a doubt by the one of the solvency of the other will not justify a breach or non-performance thereof of the one doubting."

Lumber Co. v. *Co.*, 89 Mo. App. 141, 144.

"I agree . . . that the mere fact of the insolvency of the purchaser did not put an end to the contract. It certainly would be unfair if it had that effect; for if the insolvent had any beneficial contracts remaining, it would be hard on him as well as on his creditors if they could not have the benefit of those contracts."

In re Edwards, 8 Ch. App. (Eng.) 289, 293.

"Personal insolvency on the part of the contractors does not relieve them from the obligations of their contract nor legally justify their abandonment thereof." (Head Note).

McConnell & Drummond v. *Hewes*, 50 W. Va. 33.

"Another point made is, that the appellant was released from the obligation of his contract with Troxel and Hari, by reason of the fact that the latter had become insolvent.

"We do not understand this to be the law."

Brassel v. *Troxel*, 68 Ill. App. 131, 133.

Additional authorities which recognize the general principle are:

Boorman v. *Nash*, 9 B. & C. (Eng.) 145;
Wald's Pollock on Contracts (3d ed.), 355, *n.* 88;
Page on Contracts, *s.* 1449, *p.* 2243;
Benjamin on Sales, *p.* 808.

"The appointment of a receiver does not alter or affect the rights of parties to property, or give to or take from them any liens they have acquired or are entitled to."

Lumber Co. v. *Glasgow Co.*, 101 Fed. (C. C. A. 4), 863, 868.

8.

THE BREEDERS' CLUB DID NOT REFUSE TO MAKE ITS PAYMENTS UNDER THE CONTRACT.

The Master states in his report that the payments which the Breeders' Club refused to make under the contract, were certain notes for $28,000, which were given to the Dowst Company after receipt of an architect's certificate (pp. 30, 31).

These notes were not given under the contract, for the contract does not provide for anything but cash payments (*p.* 21). They were given merely as an accommodation to the Dowst Company, who were hard up, and appealed to the Breeders' Club to "help them out," at the same time admitting that "according to a strict construction of the terms of the contract, the remaining 20 per cent. may not be due." This was on September 24, 1906 (*p.* 27).

On September 26, 1906, the president of the Club replied that he could not send any cash, but would give notes for such an amount as the architect would include in their certificate. From the letter of the Dowst Company to the architect, it is apparent that they knew that they were not entitled to further payment until the contract was completed (*p.* 28).

The master finds, on incompetent evidence, that an architect's certificate was given on September 29, for $25,000 and notes were given to the Dowst Company for $28,000 on October 15th, 1906 (*pp.* 27, 28).

It should be remembered that these notes were authorized by the Directors of the Breeders' Club on September 17, 1906, twelve days before the architect's certificate was sent, and in the receipt by the Dowst Company, it was admitted that the contract was "not yet wholly performed" (*p.* 27).

It further conclusively appears from Plaintiff's Exhibit, No. 2, and from Trustee's Exhibits, Nos. 19 and 20, that when the directors voted to give the notes on September 17, 1906, and when the notes were given on October 19, 1906, the amount due under the contract, with additions to date, was $196,245, while the deductions and payments to date were $160,767, leaving a balance due under the contract, with additions and deductions, of $35,478. This balance was less than 20 per cent. of the entire amount of the contract, with additions and deductions to date ($196,245), and nothing more became due under the contract until order No. 12 (Plf's Ex. No. 2) for extras amounting to $9,648.20 was added to the contract December 7, 1906. Accordingly when the architect's certificate was given September 29, 1906, and when the notes were given October 19, 1906, nothing was due under the terms of the contract.

These figures will not be disputed by opposing counsel, but if it is considered essential by the court that the exhibits referred to should be made part of the record here, we trust some way may be found to have the record supplemented by the addition of these exhibits.

No architect's certificate has been given since order No. 12 was added to the contract December 7, 1906. Accordingly nothing has been due under the contract since September 17, 1906, and nothing is due under the contract now.

Moreover, under the express provision of the contract, no payment of money, nor any certificate given, shall "be evidence of the performance of this contract, or be construed as a waiver of any of its terms."

Record, *p.* 23.

9.

THE FINDING THAT THE ARCHITECT'S CERTIFICATE FOR $25,000 WAS GIVEN SEPTEMBER 29TH, IS BASED ON INCOMPETENT EVIDENCE.

The Master finds (p. 28) that the architect gave a certificate for $25,000 on September 29th, 1906. This finding is based on incompetent evidence, *i. e.*, a letter from the architects, Peters & Rice, to the Dowst Company. This letter was hearsay.

In the first place it is expressly provided by the contract (pp. 22, 23) that "The Architect shall not be deemed the agent of the Owner, *for any purpose whatsoever*, except as the Owner may in fact give him a special and express authority."

It is not found that such special and express authority was given in this instance. Therefore the letter of the architects was not competent as an admission made by the Club, or by its authorized agent.

Moreover, the letter from the architects was not explanatory of any letter received by them from the Club, or from the Dowst Company. It was only material so far as it contained a statement that the certificate had been sent. It was, therefore, hearsay, and incompetent, and the finding of the Master based upon it, is unauthorized and should be stricken from the report.

It should be noted that the letters of the Dowst Company to the architects or anyone else, were competent as admissions, but not so the letters of the architects to the Company.

It is also significant that Judge Peaslee did not receive in evidence this letter of the architects (p. 33).

10.

NOTHING IS DUE UNDER THE CONTRACT.

We have seen, Section 8, *supra*, that nothing is due under the contract. This is so for the further reason that under the express terms of the contract, payments become due only upon the performance of certain conditions (p. 26). These conditions are that:

1. The contractor "shall present to the architect a detailed statement, signed by him, of the amount of work done and incorporated in the building to the date of the statement."

(The Master does not find that this was done.)

2. "Unless the work to the date in question has been done in the manner herein agreed, and there has been no breach by the contractor of any of the provisions of this contract."

(It is found that the contractor has abandoned the work under the contract before completion, p. 30).

3. "Unless the contractor shall deliver to the owner the written certificate of the architect that the work to the stage in question has, in his opinion, been done in the manner herein agreed."

(No such certificate has been delivered, and it could not be delivered because the contract has not been completed).

It is elementary that nothing can be recovered under a contract until the contract has been complied with.

Robinson v. *Crowninshield*, 1 N. H. 76;
Currier v. *Railroad*, 34 N. H. 398.

And so if a person shall undertake to improve my buildings under a contract, but does not comply with the terms of the contract, he cannot recover under the contract, for he has not done the work "by virtue of" the contract, but in

disregard of it. He may, however, recover under a *quantum meruit* or *quasi-contract*.

The point is well illustrated in the case of *Danforth* v. *Freeman*, 69 N. H. 466. There was a special contract and substantial completion of the work. There was, however, a failure to comply with the terms of the contract in the painting, and the damages for defective painting were fixed at $50, out of a total of $3,234.58. But the court held that the plaintiffs could not recover upon the contract, for the very good reason that the work had not been performed exactly (although substantially) according to the specifications. Upon this point the court says:

> "It is clear that the ground upon which the plaintiff recovers, where for failure of performance he cannot recover upon th econtract, is not the value of the work done, but the benefit received by the defendant."
> *Danforth* v. *Freeman*, 69 N. H. 466, 469;
> *Wadleigh* v. *Sutton*, 6 N. H. 15;
> *Dame* v. *Woods*, 73 N. H. 222.

If, then, a contractor who has failed in less than two per cent. of his undertaking, may not recover upon his contract, but is forced to rely upon his *quantum meruit*, we should naturally expect to find that a contractor who claims a lien for work done by virtue of a contract with the owner, must show that he has complied with the terms of his contract, or his lien must fail.

And such is the law.

The contract expressly provides, further, that no payment, acceptance, or certificate shall be evidence of compliance with the contract, or a waiver of its terms (p. 23).

It inevitably follows, therefore, that the final payment is not due under the contract.

It appears from Trustee's Exhibit, No. 19, that the total

contract price, with all additions and deductions, amounts to $205,893.02. Under the terms of the contract (p. 21) 20 per cent. of the contract price does not become due until 35 days after the contract is completed. And, since the contract has not been completed, even if its conditions had been complied with in other respects, 20 per cent. of the total is not yet due, amounting to $41,178.60.

So that the amount found due by the master ($45,995.02, p. 44) must be reduced by $41,178.60, leaving the amount due under the contract, in the most favorable light, $4,826.42.

11.

Nothing Being Due Under the Contract, No Recovery Can Be Had in the Lien Suit.

The Dowst Company having failed in various respects to comply with the terms of the contract, and nothing being due thereunder, the lien suit must fail.

> "An action cannot be brought to enforce a mechanic's lien before the contract has been completed and the money claimed under such contract has become due."
> Am. & Eng. Ency. Law (2d ed.), 20: 520.

> "As the creditor can maintain no action against the debtor until his demand is due and payable, he cannot until that time secure his lien by attachment. The cause of action and the perfected enforceable lien accrue to him at the same moment."
> *Kendall* v. *Pickard*, 67 N. H. 470, 473;
> *Kihlburg* v. *United States*, 97 U. S. 398;
> *Martinsburg &c. Co.* v. *March*, 5 Supr. Ct. Rep. 1035;
> *Palmer* v. *Clark*, 106 Mass. 373;
> *Chicago &c. Co.* v. *Price*, 11 Supr. Ct. Rep. 290;
> *Harmon* v. *Ashmead*, 60 Cal. 439;
> *Pitt* v. *Acosta*, 18 Fla. 270;

Thomas v. *Turner*, 16 Md. 105;
Lauer v. *Dunn*, 115 N. Y. 405;
Kinney v. *Hudnut*, 3 Ill. 472;
Preusser v. *Florence*, 4 Abb. N. C. (N. Y.) 136;
Schroth v. *Black*, 50 Ill. App. 168.

12.

DELAYS.

Another respect in which the contractor has failed here to comply with the contract is in the matter of delays.

The Master has found (p. 30) that the contractors did not complete the contract within the time specified, and he excuses them on the ground that the Breeders' Club delayed the work by failing to perform its part of the contract seasonably.

The fact remains, however, that the Dowst Company did not obtain a certificate for extension of time from the architect as provided in the contract under the head of "Strikes and other delays," nor did the contractors make a claim for extension of time in writing as therein provided (p. 30).

And since, by the express terms of the contract, time is made of the essence of the contract (p. 21), and no extension was obtained under its terms (p. 23), the contract was not complied with, and nothing is payable under it.

13.

DIFFERENCES BETWEEN SUBSTANTIAL PERFORMANCE AND ABANDONMENT OF THE WORK.

As a general rule if there has been an honest endeavor to complete the contract, and substantial compliance with its terms, a lien may be enforced.

Am. & Eng. Ency. Law, 2d ed., 20: 366-7;
27 Cyc. 85-7.

But the authorities are equally clear that a wilful omission in the performance of the contract, unless trivial, will preclude the assertion of a lien.

Am. & Eng. Ency. Law (2d ed.), 20; 367;
27 Cyc. 85, note 27;
Van Clief v. *Van Vechten*, 130 N. Y. 571, 579;
Elliott v. *Caldwell*, 43 Minn. 357;
D'Arnato v. *Gentile*, 173 N. Y. 596; 54 App. Div. 625;
Weeks v. *O'Brien*, 59 N. Y. Super Ct. 28;
May v. *Menton*, 18 Misc. (N. Y.), 737;
Kohl v. *Fleming*, 21 Misc. 690;
Fox v. *Davidson*, 36 N. Y. App. Div. 159;
Spence v. *Ham*, 27 N. Y. App. Div. 379;
Anderson v. *Todd*, 8 N. Dak. 158;
Federal Trust Co. v. *Guingues*, 74 Atl. (N. J.) 652, 654.
Braseth v. *State Bank*, 98 N. W. 79; 12 No. Dak. 486;
Wade v. *Haycock*, 25 Pa. St. 382;
Gillespie Co. v. *Wilson*, 123 Pa. St. 19;
Sherry v. *Madler*, 123 Wis. 621;
Roane v. *Murphy*, 96 S. W. (Tex.) 782;
Hahn v. *Bonacum*, 76 Neb. 837;
Gillis v. *Cobe*, 177 Mass. 584;
Burke v. *Coyne*, 188 Mass. 401;
Schindler v. *Green*, 82 Pac. (Cal. App.) 341;
Smith v. *Ruggeriero*, 173 N. Y. 614;
King v. *Moore*, 70 N. Y. S. 6.

14.

Architect's Certificate is Essential.

We have seen that there is no competent evidence that any architect's certificate has been given for any sum that has not already been paid under the contract.

That such a certificate is essential to recovery under a contract like this is undisputed.

Am. & Eng. Ency. Law, 2d ed., 20: 370; 30: 1205, 1237-9;
Addison on Contracts, *s.* 394;
27 Cyc. 87, note 38;
Henley v. *Walker* (Mich. 1890), 8 L. R. A. 207;
Packard v. *Van Schoick*, 58 Ill. 79;
Cocy v. *Lehman*, 79 Ill. 173;
Barney v. *Giles*, 120 Ill. 154;
Arnold v. *Bournique*, 144 Ill. 132;
Kirtland v. *Moore*, 40 N. J. Eq. 106;
Wolf v. *Michaelis*, 27 Ill. App. 336;
Provost v. *Shirk*, 223 Ill. 468;
Boots v. *Steinberg*, 100 Mich. 134, 135;
Boden v. *Mayer*, 95 Wis. 65;
Forster Lumber Co. v. *Atkinson*, 94 Wis. 578;
Nesbit v. *Braker*, 93 N. Y. S. 856.
Federal Trust Co. v. *Guingues*, 74 Atl. (N. J.) 652, 656.

15.

TWO KINDS OF WORK UNDER SAME CONTRACT, ONE LIENABLE, THE OTHER NOT, FOR LUMP SUM, NO LIEN.

Where a contractor engages to do different kinds of work under the same contract for a lump sum, upon part of which he is entitled to a lien and the other part not, it is held by all the authorities that no lien attaches in his favor.

> "An architect cannot maintain a petition to establish a mechanic's lien for labor performed under an entire contract to prepare plans and specifications and supervise the erecting of a building for a round sum of money, there being no lien for the work of preparing the plans and specifications" (Head note).
>
> *Libbey* v. *Tidden*, 192 Mass. 175, 177.
>
> "If labor and materials have been furnished and used in the erection of a building, under an entire contract,

with no stipulation for any separate price for either, and it is impossible to determine what part of the contract price is to be applied to either, and there is no mechanic's lien for the whole, there can be none for any part" (Head note).

Morrison v. *Minot*, 5 Allen (Mass.) 403;
Brewster v. *Wyman*, 5 Allen (Mass.) 405;
Graves v. *Bemis*, 8 Allen (Mass.) 573.

"One employed on salary to do such work as may be required, and doing lienable and non-lineable work indiscriminately, is not entitled to a mechanics' lien, since the court cannot undertake from extrinsic evidence to apportion the salary between the lienable and non-lienable items." (Head note.)

Getty v. *Ames*, 30 Or. 573;
Allen v. *Elwert*, 29 Or. 444.

This general doctrine is recognized by the authorities everywhere. See the following cases:

Driscoll v. *Hill*, 11 Allen (Mass.) 154;
Angier v. *Distilling Co.*, 178 Mass. 163;
General Fire Extinguisher Co. v. *Chaplain*, 183 Mass. 375;
Evans Marble Co. v. *Trust Co.*, 101 Md. 210;
McLain v. *Hutton*, 131 Cal. 132;
Peatman v. *Light & Power Co.*, 105 Iowa, 1;
Adler v. *Exposition Co.*, 126 Ill. 373;
McMaster v. Merrick, 41 Mich. 505;
Edgar v. *Salisbury*, 17 Mo. 271;
Sweem v. *Railroad Co.*, 85 Mo. App. 87, 95;
Baker v. *Fessenden*, 71 Me. 292;
Rinzel v. *Stumpf*, 93 N. W. (Wis.) 36.

It is found by the master (Record, p. 15) that in addition to the buildings included in their contract with the club, the Head & Dowst Company, for the lump sum of $187,644, was to furnish certain sidewalks, platforms, fences and a jockey board on the premises at Salem, New Hampshire.

Note where they were situated. The sidewalks were made of brick laid on the ground without cement, and were simply used for walks between the various buildings. The platforms were laid down at the ends of the sidetracks outside of the grounds, in proximity to no building whatever. The fences were built to exclude the public from the grounds and were appurtenant to no building. The same is true of the large jockey board (Record, p. 16).

The master finds (Record, (p. 16) that these various things were attached to the realty. This the appellant does not dispute. But the master does not and could not on the facts find that they were in any way a part or appurtenance of a building. Under the New Hampshire law they must be in order to be lienable and that they were a considerable item of the contract is apparent from the fact that the fence was built to exclude people from the grounds, that the walks extended between the various buildings and that the platforms outside of the grounds were designed to accommodate the people patronizing the track.

In *Thompson Mfg. Co.* v. *Smith*, 67 N. H., 409, it is said on this question of lienable or non-lienable items:

> "The burden rests upon the plaintiff to prove the lien which they assert. The engine was not a building within the meaning of the statute, and it does not appear to have been a part or an appurtenance of a building when the repairs were made. It was portable. It might be placed in a building, and yet be neither a part nor an appurtenance of the building. It does not appear even that the 'sawmill' in which the engine was at one time situated was a building. It might have been nothing but a saw operated by the engine in the open air, or under a temporary cover. *State* v. *Livermore*, 44 N. H. 386."

Thompson Mfg. Co. v. *Smith*, 67 N. H., 409, 410;
Grafton &c. Co. v. *Company*, 69 N. H., 177;
Meek v. *Parker*, 63 Ark., 367;
Baum v. *Covert*, 62 Miss., 113;
Turner v. *Wentworth*, 119 Mass., 459;
Harrison v. *Asso.*, 134 Pa. St., 558.

To sum up on this point. There was an entire contract for a lump sum to do certain things, part lienable and part not. No way for apportioning the items is expressed in the contract. It is impossible to ascertain how much of the lump sum was charged for lienable and how much for non-lienable items. The authorities in such a situation are all one way and the lien must fail.

16.

Extent of Lien.

It clearly appears from the Master's Report (*pp.* 31, 32) that certain real estate was bought by Andrew Miller, the president of the Club, which was not needed for racing purposes.

> "These areas were included in the land covered by the deed of Andrew Miller to the New England Breeders' Club, and were set off by the Club from the parts of the track actually used for racing purposes, by fences built by the Club, after the acquisition of the property."
>
> Report, *pp.* 31, 32.

It is clear that the land outside the fence, including the McKinnon house, "the land northerly and westerly of New Pleasant Street, and the land southerly and westerly of the railroad sidetracks," (*pp.* 31, 32), was *not* necessary for the convenient use of the grounds as a race course, that it was

not treated by all concerned as one parcel, and that it had *not* been used for a common purpose. The McKinnon house, indeed, was not only outside the fence, but "was leased by the Club to some one not connected with the tracks, and was not occupied by any one connected with the Club" (*p.* 31).

It follows that the McKinnon house, the land northerly and westerly of New Pleasant Street, and the land southerly and westerly of the railroads, were not "reasonably necessary for the occupation of the buildings included in the contract, for the purposes intended."

27 Cyc., 221, 222.
Am. & Eng. Ency. Law, 2d ed., 20: 281;
Federal Trust Co. v. *Guingues*, 74 Atl. (N. J.), 652, 656.

The case most nearly in point concerns the fair grounds of an agricultural society (presumably for breeding purposes), consisting of about sixty acres of land, with race track, grandstand, corrals, stables and other improvements. It was held to be error to establish a lien on the entire premises in favor of persons who constructed a building on such grounds to be used as a hotel, club house and saloon.

Tunis v. *Asso.*, 98 Cal., 285;
Storage Co. v. *Foundry Co.*, 105 Pa. St., 248;
Cowan v. *Griffith*, 108 Cal., 224;
Colorado Iron Works v. *Taylor*, 12 Colo. App., 451.

17.

SUMMARY.

It is our general position that the validity of the lien depends upon the *status* of the lien suit in the State Court; that that suit is brought upon the special contract; that nothing is due under the special contract, because its terms have not been complied with; that, in particular, the contract has not been completed by the *Head & Dowst Company;* that completion of the contract, without adequate excuse, is essential to the maintenance of a suit under the contract; and that insolvency of the Club, failure to make payments and action by its officials as outlined in the Master's Report, furnish no adequate excuse for failure to complete the contract and otherwise comply with its terms.

a.

General Bearing of Insolvency.

Insolvency of the owner gives to the contractor no right to abandon his contract, neglect to comply with its terms and bring suit upon it to enforce a mechanic's lien.

Performance by the contractor must always be a condition precedent to the right to enforce payment. The right to enforce payment must always be a condition precedent to the right to maintain an action for payment under the contract. Hence the contractor can maintain no suit under the contract until he has performed his part of the contract.

If the owner becomes insolvent, the condition precedent, *i. e.*, performance of the contract, does not thereby spring into being. On the contrary, the contractor here seizes upon the owner's insolvency as an excuse for ***not performing the contract.*** If now the owner's insolvency were the same thing as performance, the entire contract price would at once become due, which is a manifest absurdity. All that

the owner claims is a right to cease work, and collect, not the contract price, but the contract price *less what should be allowed for failure to complete the contract. In other* words, the contractor does not seek to collect the contract price at all, but what his work is fairly worth in its uncompleted state. That is, he seeks to recover, not the amount due him under the contract (which is nothing), but a *quantum meruit.*

We thus see that insolvency may be a *reason* for abandoning the contractor's rights under a contract and taking refuge in a *quantum meruit,* but it is never an excuse for non-performance in the sense that anything short of compliance with the contract will justify a contractor in maintaining suit to enforce payment under its terms.

And so if a person shall undertake to improve my buildings under a contract, but does not comply with the terms of the contract, he cannot recover under the contract, for he has not done the work "by virtue of" the contract, but in disregard of it. He may, however, recover under a *quantum meruit* or *quasi*-contract.

The point is well illustrated in the case of *Danforth* v. *Freeman,* 69 N. H., 466. There was a special contract and substantial completion of the work. There was, however, a failure to comply with the terms of the contract in the painting, and the damages for defective painting were fixed at $50, out of a total of $3,234.58. But the Court held that the plaintiffs could not recover upon the contract, for the very good reason that the work had not been performed exactly (although substantially) according to the specifications. Upon this point the court says:

> "It is clear that the ground upon which the plaintiff recovers, where for failure of performance he cannot recover upon the contract, is not the value of the work done, but the benefit received by the defendant."

Danforth v. *Freeman*, 69 N. H., 466, 469;
Wadleigh v. *Sutton*, 6 N. H., 15;
Dame v. *Woods*, 73 N. H., 222.

If then a contractor who has failed in less than two per cent of his undertaking, may not recover upon his contract, but is forced to rely upon his *quantum meruit*, we should naturally expect to find that a contractor who claims a lien for work done by virtue of a contract with the owner, must show that he has complied with the terms of his contract, or his lien must fail.

We do not suggest that a contractor *must* proceed to complete his contract with an insolvent owner in order to collect by legal process what is fairly due him; nor that a Court of equity will enforce specific performance; nor that it may not be good judgment to stop the work where it is, and rely upon a *quantum meruit*. Our point is that a contract is a contract; that unless its terms are fulfilled, payment *under it* does not become due; and no suit upon the contract, in New Hampshire at least, can be maintained by one who has deliberately chosen *for any reason* not to perform it.

It follows inevitably that *this contractor*, who has confessedly not performed his contract, cannot maintain his suit *upon the contract*. His action must, therefore fail, for it is based upon the contract, not upon a *quantum meruit*.

"As appears from the pleadings, the action (in the State Court) *was based upon the original contract.*"
Master's Report, *p.* 32.

Therefore the suit to enforce the lien must fail because it is based upon the original contract, and no suit can be maintained upon the original contract because its terms have not been fulfilled, and the contract has not been performed in full.

We thus see that if a contractor has failed to take security for his payments, and the owner becomes insolvent, he is not excused from performing his contract in the sense that he may stop work and sue for the contract price. The insolvency of the owner places the contractor in a position where he must take his choice of two remedies:

> (1) Complete his contract and by that method place himself in a position where he may maintain his suit under his contract and enforce his mechanic's lien, or
>
> (2) Stop where he is, fail to complete his contract, sue on a *quantum meruit*, lose his lien and become a general creditor in such sum as the court shall award upon consideration of what the work is fairly worth to the estate.

Where there is one entire contract price, there is no way to apportion the amount that shall be allowed for the work that has been actually done: the only refuge is a *quantum meruit*. We shall see later (Section 4) that a mechanic's lien cannot be based upon a *quantum meruit*. In this case no attempt is made to base it upon that form of action.

This claimant, having deliberately chosen to abandon the contract, applies with a poor grace for a preference over all other creditors.

Why, indeed, should the creditor who has put $45,000 into the buildings, stand any better in a bankruptcy court than the creditor who has loaned $50,000 to the owner to make a payment to the contractor on account of the building contract?

The only reason is because Section 67d of the Bankruptcy Act gives a preference to *valid* mechanic's liens. This does not mean that this Court is interested to help any creditor out at the expense of the others. It means that if, upon investigation, the lien appears good under a strict construc-

tion of the statute (which is in derogation of the common law), then the lien holder is entitled to have his lien enforced. But if he has not complied with the letter and spirit of the statute, he has no valid lien, and he must share with the other creditors. The court has no right to strain a point in his favor, or to apply equitable remedies. It is no hardship to any creditor who has neither security, mortgage, nor a good lien, to share with the general creditors.

What the Court might *give* to him from an impulse of generosity it would *take* unjustly from others who are equally worthy.

b.

Waiver.

If performance of the contract was *waived* by the owner, the contractor would thereby be protected from a suit for damages for failure to complete the contract. But such a waiver would not amount to *performance* in the sense that the contract price would then become due. The contract not having been performed, the contract price would *not* become due, but such sum might become due as the work done was fairly worth. Waiver excuses performance, *i. e.*, removes danger of suits for damages for failure to perform; but waiver furnishes no consideration for the recovery of the contract price. This is elementary.

Assuming that the president of the Club had full authority to waive performance, no waiver is shown.

In the first place, the Master does not find that *performance was waived.*

He finds (*p.* 30) that the *Dowst Co.* abandoned work under the contract, ***not because the performance was waived, but because the notes given on October 15th were not paid, and because the Club was considered insolvent.***

From the facts stated no waiver can fairly be inferred.

The Master finds as a matter of *fact* (*p.* 30) that *the failure of the Club to make its payments under the contract constituted such a breach of the contract on its part, as to entirely warrant the Dowst Co. in abandoning further work under the contract.*

Here is no waiver of performance, but *a right to abandon claimed and exercised.*

As a matter of law and fact, every payment which had become due under the contract had been fully met; moreover, if there had been a failure to pay anything under the contract, such failure was no more an excuse for abandoning the work than a failure to pay rent gives the landlord a right to evict his tenant.

A breach by one party gives the other party a right to sue for damages, but not a right to violate the contract.

We claim that notice to the *Dowst Co.* that the Club could not pay, and that they "must look to their lien to support their claim" (*p.* 29), was no *waiver,* but a *notice* to the *Dowst Co.* to rely upon their strict legal rights. They were thus notified that the Club was insolvent, and that the Club's real estate would be assets for which they must contend with the general creditors of the Club. They were thus *put on their notice,* that if they did not proceed strictly in compliance with the law, they would lose their lien. They acted with their eyes wide open; they acted on the knowledge that the Club was insolvent, and their contract was not completed, and nothing was payable under it. They did not rely on a waiver, for none had been made.

But assume that *Miller's* statement was a waiver, and that he was fully authorized to make such waiver, so far as *the Club* was concerned.

It should be remembered that he knew that the Club was insolvent, and that the general creditors of the Club had rights. How far could *Miller,* by his act of waiver,

by his burst of generosity to the *Dowst Co.*, affect the rights of the general creditors whom we represent before this court?

Such a waiver by the president of the Club would constitute an attempted preference, and would be a fraud upon the Bankruptcy Act.

To make the point plain, let us assume that Miller's act was in writing, signed, sealed and delivered, ratified by the directors and stockholders. It would then amount to a deed of conveyance, which is certainly stronger than a verbal waiver.

But such a conveyance or transfer made within four months of the filing of the bankruptcy petition, would be a fraud on the act, and void under Section 67e.

We claim, moreover, that this waiver, if there was one, was not made "in good faith," but was made "in contemplation of or in fraud upon" the bankruptcy act as defined in *s.* 67d.

We insist that a lien founded upon a waiver of performance by a bankrupt debtor, in an attempt to create a preference over all other creditors, is not a lien "given or accepted in good faith."

" 'Good faith' means that the creditor should not act in such a way as to intentionally defeat the Bankruptcy Act, but should let the debtor have the money or property for some honest purpose."

Remington on Bankr., *p.* 899.

We refrain from multiplying authorities along this line. It is plain that a waiver of performance could have no efficacy unless it had the effect, by voluntary act of the bankrupt, to turn the property over to the contractor without consideration, *i. e.*, performance. And such an abandonment of all the estate of the bankrupt to one creditor with-

out consideration, creates an illegal preference just as surely as a deed of assignment without consideration.

Bankr. Act., *s.* 67d.

18.

RHOEM v. HORST.

We have extended our argument on the main question in order that the Honorable Court may clearly see the distinction between an entire contract for the erection of buildings on the owner's real estate, and an entire contract for the delivery of personal property.

The court below failed to note this distinction, and decided against us upon the lien question on the strength of *Rhoem v. Horst*, 178 U. S., 1.

Rhoem v. Horst, supra, declares a familiar rule embracing the following propositions:

a. After the renunciation by one party of a continuing agreement to deliver *personal property*, the other party is exused from further performance, or tender of performance, and may at once bring suit for breach of contract.

b. The measure of damages is the difference between the contract price and the market price.

It is plain that this rule could apply to a building contract only in case no work had been done under it. There would then be a right of action for breach of contract, and the measure of damages would be the difference between the contract price and the market price, *i. e.*, what it would cost to construct the building at going prices.

It should be equally plain that where the building has been partially completed, an action for the breach to recover the unearned profits, would not be enough; the principal ground of recovery would be compensation for the portion already constructed, including what it actually cost at going prices, as well as the profit on that portion.

All authorities agree that in case of an uncompleted

contract for an entire price, the action is on a *quantum meruit*, and the measure of damages, where most of the work has been done, is the contract price, less what it would cost to complete the work (69 N. H. 466, 468, 469).

The rule is laid down as follows in Clark on Contracts, section 255:

> "Where a contract is broken by one of the parties, the other party acquires, or may acquire three distinct rights:
>
> "(*a*) He may be discharged from further performance.
>
> "(*b*) If he has done anything under the contract, he has a right to sue on the *quantum meruit*, a cause of action distinct from that arising out of the original contract, and based upon a contract created by law.
>
> "(*c*) He has a right of action on the original contract, or term of the contract broken, and may maintain:
>
> "(1) A suit to obtain damages for the loss sustained by the breach.
>
> "(2) A suit to obtain specific performance of the contract by the other party."

Clark on Contracts, section 255.

(Note that the right to recover for what has been done under the contract, is a cause of action distinct from that arising out of the original contract.)

The entire ground of recovery in the suit at bar was for what had been done under the contract; hence the entire cause of action arose from an implied contract; none of it was grounded on the contract itself, or any breach of that contract.

It is plain that *Rhoem v. Horst*, 178 U. S., 1, *supra*, is no authority for any one of the following propositions:

a. The inability of the owner to pay the contract price is a sufficient excuse for the contractor to abandon work on the owners building; or

b. Failure or refusal to make payments is a sufficient excuse for such abandonment; or

c. Such inability, failure, or refusal, advances the time when payments are due under such contract; or

d. Such inability, failure, or refusal, gives a present right of action when nothing is due or payable under such contract; or

e. A lien suit may be maintained under a contract when nothing is payable under its terms; or

f. A party to a building contract, may in any case enforce his mechanics' lien for labor and materials, whether he completes his contract or not; or

g. A party to a building contract may in any case recover any payment under such contract whether he has fully performed every condition precedent to such payment, or not.

To entitle the plaintiff in this case to maintain his mechanics' lien suit, authority must be found for the foregoing propositions. *Rochm* v. *Horst*, *supra*, is authority for none of them; hence the opinion which is based on *Rochm* v. *Horst*, is unsound.

It is clear that the Circuit Court of Appeals fell into a plain error in resting its decision upon *Rochm* v. *Horst*, *supra*. We venture to state that this error was no more startling (though less agreeable) to us than to counsel for the Dowst Company, who never cited *Rochm* v. *Horst* in brief or argument.

The distinction, of course, rests in the peculiar characteristics of *real property* to which the materials contracted for are attached under a building contract. The result has been a special department of rules of decisions which are grouped generally under the head of "Builder's Contracts" in every text book of considerable scope. *Rochm* v. *Horst*, *supra*, will not be found as an authority for any proposition

under that head. It applies only to the delivery of *personal* property.

Second Point.

The Jurisdictional Question—the Binding Effect of Proceedings in State Courts.

We have now considered the main question of the validity of the mechanic's lien claimed by the Dowst Company, and we have discussed the various phrases of that question raised by the first group of errors noted in our specification, page 7.

We now come to the Jurisdictional Question, and proceed to discuss in some detail the right of the United States Court to take to itself, with the real property of the bankrupt, all controversies concerning alleged liens, pledges and mortgages upon that property.

In order to determine the merits of this question, we must first decide whether this proceeding is a regular step *"in bankruptcy proceedings," or "a controversy arising in bankruptcy proceedings."*

1.

A Controversy Arising in Bankruptcy Proceedings.

The decree from which our appeal is taken, is upon the Trustee's petition that the alleged lien of the *Dowst Company* be adjudicated in the United States District Court (Record, p. 58). The record discloses, therefore, a "controversy *arising in bankruptcy proceedings*" rather than a regular step *"in bankruptcy proceedings,"* so that it falls under Section 24 (a), rather than Section 25, of the bankruptcy act.

Although we thought it prudent in the court below to file a petition for revision in addition to our appeal, thus

following the suggestion made by that court in *Fisher* v. *Cushman,* 103 Fed. 860, we have no doubt that the appeal was properly taken under said Section 24 (a).

Hutchinson v. *Otis,* 190 U. S., 552;

Burleigh v. *Foreman,* 125 Fed. 271 (C. C. A. Mass.);

Mason v. *Wolkowich,* 150 Fed., 699 (C. C. A. Mass.);

Rem. on Bankr., ss. 2870, 2871, 2882, 2900, 2912, 2923;

Hewitt v. *Berlin Machine Co.,* 11 A. B. R. 709 (U. S. Sup. Ct.);

In re Friend, 134 Fed. 778 (C. C. A. 7th Cir.);

Plymouth Cordage Company v. *Smith,* 194 U. S. 311;

In re First National Bank of Canton, 14 A. B. R. 180 (C. C. A. 6th Cir.);

Liddon & Bro., v. *Smith, et al.,* 135 Fed., 43 (C. C. A. 5th Cir.).

2.

BOTH LAW AND FACT ARE TO BE REVIEWED.

Since the appeal comes within the provisions of Section 24 (a), this Honorable Court will review both questions of law and questions of fact.

Elliott v. *Toeppner,* 187 U. S. 327;

Bank v. *Chicago &c. Co.,* 198 U. S., 280;

Remington on Bankr., s. 2881.

3.

QUESTIONS OF DISCRETION ARE FOR THIS COURT.

Not only are questions of fact (including discretion) always to be reviewed by this Honorable Court upon appeals

of this character, but in this particular case "all questions of discretion" are especially reserved by the Honorable District Court by his own wish. (Record, *p.* 58.)

In matter of procedure, as well as in substance, this appeal is to be treated like any other appeal in equity.

In re Baker, 104 Fed. 287 (C. C. A. Mass.);
Mason v. Wolkowich, 150 Fed. 699 (C. C. A. Mass.);
Bardes v. Bank, 178 U. S. 533.

4.

THE POWER OF THE BANKRUPTCY COURT.

The decree in this case is based as we have seen upon the petition of the Trustee in bankruptcy that the alleged lien of the *Dowst Company* be adjudicated in the District Court (Record, *p.* 58). It appears further that the lien proceedings in the State Court were directed against property which was in the custody of the District Court and actually in the hands of the Court's trustee in bankruptcy (*pp.* 32, 43).

Under these circumstances the *power and authority* of the Federal Court to retain jurisdiction of all claims against property in its custody, cannot be doubted.

New River Coal Co. v. *Ruffner Bros.*, 165 Fed. (C. C. A. 4th Cir.) 881;
In re Dana, 167 Fed. (C. C. A., 8th Cir.) 529;
In re Driggs, 171 Fed. (D. C. S. D., N. Y.) 897;
In re Knight, 125 Fed. (D. C., Ken.) 35, 39, 42-5;
In re Emslie, 102 Fed. (C. C. A., 2d Cir.) 291;
In re Watts, 10 A. B. R. (U. S. Sup. Ct., 1903) 113, 124; 190 U. S., 1;
Matter of Cameron, Currie & Co., 20 A. B. R. (D. C., Mich.) 790, 794;
Blake v. *R. R.* 3 Fed. (C. C. A., Ohio), 586;

Bear v. *Chase*, 99 Fed. 920;
In re Kenny, 97 Fed. 554;
In re Russell, 101 Fed. (C. C. A., N. Y.) 248;
In re Goldberg, 117 Fed. 692;
In re Hornstein, 122 Fed. 266;
In re Breslauer, 121 Fed., 910, affirmed in *Clarke* v. *Larremore*, 188 U. S., 486;
In re Lesser Bros., 5 A. B. R., 320;
Blake, Moffitt & Towne, et al., v. *Francis Valentine Co., et al.*, 1 A. B. R. 372;
Carter v. *Hobbs*, 1 A. B. R. 215;
In re Charles E. Northrop, 1. A. B. R. 427;
In re Chas. D. Adams, 1 A. B. R., 94;
In re Ball, 118 Fed. 672;
In re John Kerski, 2 A. B. R. 79.

"Court proceedings whereby it is attempted to levy upon or seize property in the custody of the bankruptcy court may, of course, be enjoined."
Remington on Bankruptcy, *s.* 1908;
White v. *Schloerb*, 178 U. S. 542;
In re Lemon & Gale Co., 112 Fed. 296;
In re Huddlestone, 1 A. B. R. 572;
In re Whitener, 105 Fed. 180.

The authorities are also numerous as to the correct *practice.*

New River Coal Land Co. v. *Ruffner Bros.*, 165 Fed. (C. C. A., 4th Cir.) 881;
In re Dana, 167 Fed. (C. C. A., 8th Cir.) 529;
In re Driggs, 171 Fed. (D. C. S. D., N. Y.) 897;
In re Knight, 125 Fed. (D. C., Ken.) 35, 39, 42-5;
In re Emslie, 102 Fed. (C. C. A., 2d Cir.) 291;
In re Falls City Shirt Mfg. Co., 98 Fed. 592;
In re Schermerhorn, 145 (C. C. A.) 341;
Whitney v. *Wenman*, 198 U. S., 539;

In re N. Eng. Piano Co., 122 Fed. (C. C. A., Mass.) 937;
Chauncey v. *Dyke Bros.*, 119 Fed. (C. C. A., Ark.) 1;
Roofing Co. v. *Penn. Inst.*, 8 A. B. R. (D. C., Penn.) 742;
In re Rochford, 124 Fed. (C. C. A., So. Dak.) 182;
In re Russell, 101 Fed. (C. C. A., 2d Cir.) 248;
Rockel on Mech Liens, p. 475, *n.*

The principle that State Courts have no right to interfere with property in the possession of a trustee in bankruptcy, has been recently conceded by the New Hampshire Supreme Court in a replevin suit in these words

> "The State Courts have no jurisdiction of an action of replevin against a trustee in bankruptcy."
> *Concord &c. Co.*, v. *Couch* (June, 1909), 75 N. H. 593.

5.

SHOULD THE POWER OF THE FEDERAL COURT BE EXERCISED.

The power of the Federal Court to take to itself "all litigation in respect to a bankruptcy estate and as to property in the possession of the bankruptcy trustee" seems to be conceded by the Honorable District Court in the opinion of January 6, 1910 (Record, p. 49). It is there said:

> "Where there is concurrent jurisdiction the court that first takes hold of the *res* in a controverted situation may hold the ground. . . . . The exact and only question is the status of the lien under New Hampshire law. The parties are entitled to have that question passed upon by some suitable court."
> Record, p. 49.

It is our contention that no court of last resort has passed upon the legal questions involved in the validity of the alleged lien, that the State Court has refused, on account of a technicality to consider those questions; and that the Federal Courts will not permit one creditor to take advantage of all the other creditors because of a blunder made by counsel before the corporation was adjudged a bankrupt, but will investigate the alleged lien and dispose of it according to the actual merits of the case.

GENERAL APPLICATION OF THE FOREGOING PRINCIPLES.

Before we compare the principles laid down by the foregoing authorities, with the opinion of the Circuit Court of Appeals, we desire to call attention to the mistake of that court in stating that the petition in bankruptcy was filed "more than four months after the lien suit was commenced" (Record, p. 63).

It clearly appears from the record, however, that the petition in bankruptcy was filed April 10, 1907 (p. 32), which was well within four months of the beginning of the lien suit, Dec. 24, 1906 (p. 32).

It thus appears that the bankruptcy proceedings were begun in season to dissolve completely an ordinary attachment, and to render imperative a careful examination of the strict legal rights of any party claiming an extraordinary attachment.

Upon the cases alreay cited, it clearly appears that it was the undoubted right of the United States District Court

a. To investigate the alleged lien of the Dowst Company and prevent by injunction any proceedings in the State courts which might tend to disturb the possession of the bankrupt estate in the hands of its trustee;

b. To determine upon their merits the validity and amount of mechanic's liens claimed upon the real estate in the possession of the trustee in bankruptcy;

c. To decline to accept the results reached in the State courts of New Hampshire as in any way affecting or binding the United States courts;

d. To hold, upon the record presented, that the Dowst Company had no right to enforce its alleged lien in the State courts.

So far as the Circuit Court of Appeals took position in its opinion, contrary to the foregoing propositions, we ask that said positions be declared erroneous and that the same be duly corrected.

THIRD POINT.

General Equities.

In the opinion of the Circuit Court of Appeals, it was stated substantially that:

1. The Supreme Court of New Hampshire held "that all the facts essential to the creation and preservation of the lien had been found for the plaintiff in the superior court." p. 65.

2. "We have no reason to doubt that the trial in the superior court was properly conducted and full defence made by the assignee in insolvency." p. 65.

3. In the superior court "a full, complete and impartial trial was had." p. 63.

4. Neither as to the superior court or the Supreme Court "can it be said that the result came from any substantial default." p. 66.

These statements by the court below indicate clearly what sort of trial should have been had in the superior court, and what sort of questions should have been raised for the consideration of the Supreme Court, to bind the trustee in bankruptcy to the result of a suit in which he was not a party.

We have seen, however, that these statements are incorrect; that by a blunder of counsel, the merits of the case were never passed upon, and the legal questions involved were not considered.

It is clear, therefore, that the general equities are with the appellant.

Fourth Point.

Technical Questions.

The technical points as to the form of the decree and the proceedings in the court below, in case the cause is remanded to the Circuit Court of Appeals, need little consideration at this time.

If it shall appear to this Honorable Court, that the record is sufficiently complete to warrant a final decision on the merits of the case, a permanent injunction should be ordered which would clear from the bankrupt estate the cloud raised by the Dowst Company's claim. We feel, however, that the record is not in a condition to warrant a final decree, but that justice would be best served by sending the case back to the district court to have the merits of the lien fully heard before that court.

In no event, we feel confident, should the decree of the Circuit Court of Appeals and of the district court be allowed to stand.

No decree should stand in favor of the Dowst Company until the cause has been fully heard on its merits in some court of competent jurisdiction, after the trustee in bankruptcy and his counsel have been fully heard.

Fifth Point.

There remains to discuss the motion to dismiss filed by the Dowst Company in this Honorable Court, November

29, 1913. It is probable that the argument in the main cause may be reached before the day noticed for hearing the motion to dismiss. In that case we assume that the motion to dismiss and the main cause will be heard together. We therefore proceed to argue the motion in this brief.

Two points are urged in the motion to dismiss. The first goes to the general jurisdiction of this Honorable Court upon the record herein.

The second point goes to special right to appeal in a case of this nature.

A.

APPELLEE'S FIRST POINT—JURISDICTION.

The authority of the United States Courts to assume jurisdiction of all questions affecting the bankrupt's real estate, is fully argued by us under our Second Point, pages 51 to 57, herein. We have nothing to add to this phase of the question.

B.

APPELLEE'S SECOND POINT—RIGHT TO APPEAL.

This question arises on the right of the trustee to an appeal to the Supreme Court from the decision of the Circuit Court of Appeals.

The trustee contends that he has such right under section 24a of the Bankruptcy Act which provides:

> "The Supreme Court of the United States . . . (is) hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases;"

and under Section 6 of the Court of Appeals Act of 189[illegible] which provides:

> "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed."

This conclusion that the right of appeal lies under the above quoted sections of the Bankruptcy Act and the Court of Appeals Act is arrived at by process of elimination, and a consideration of what the Supreme Court has said upon the subject.

Section 25a of the Bankruptcy Act provides that appeals, as in equity cases, may be taken in bankruptcy proceedings to the Circuit Courts of Appeals; (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt, (2) from a judgment granting or denying a discharge, and (3) from a judgment allowing or rejecting a claim of five hundred dollars or over.

It is apparent that the present is not a case involving the adjudging of any one a bankrupt, allowing or denying a discharge, or allowing or rejecting a claim. The appellee herein has made no application to the trustee to have its claim allowed.

Section 25b allows an appeal to the Supreme Court in certain cases from a final decision of the Circuit Court of Appeals allowing or rejecting a claim, but the section does not apply for the reason just given, that this case does not involve the allowance or rejection of a claim.

Referring now to the quotation from Section 6 of the Act of 1891, it appears that in cases not thereinbefore made final in the Circuit Court of Appeals, an appeal will lie as of right to the Supreme Court. The cases made final are those in which the jurisdiction depends on diverse citizen-

ship, cases arising under the patent, revenue and criminal laws, and in admiralty cases. It is obvious that the present case is not included in this last classification.

When this case was taken to the Circuit Court of Appeals some doubt arose in our minds as to whether the right of review was given by Section 24a providing for appeals in controversies arising in bankruptcy proceedings, or Section 24b which confers the right of superintendence and revision upon the Circuit Courts of Appeals in matters of law in the proceedings of the inferior courts of bankruptcy. Both methods of review were invoked by the trustee in bankruptcy, but it was held by the Circuit Court of Appeals, in denying our motion for a rehearing, that:

> "These are the cases in which judgments for the Head & Dowst Company were entered on January 3, 1911, 184 Fed. 409. This petition is entitled both in '*Hobbs, Trustee* v. *Head & Dowst Company*,' and in 'Nathaniel W. Hobbs, Trustee, Petitioner.' It is not necessary to notice the latter proceeding, because it was plainly dismissed for want of jurisdiction. The merits were disposed of in *Hobbs, Trustee, Appellant* v. *Head & Dowst Company, Appellee*."
>
> *Hobbs* v. *Head & Dowst Co.*, 185 Fed., 1006.

It is plain, therefore, that the Circuit Court of Appeals has already decided that the pending case is properly an appeal inolving "a controversy arising in bankruptcy proceedings" under Section 24a, and not properly a petition for review in the bankruptcy proceedings proper under Section 24b. If that court was right in treating the proceeding as an appeal under Section 24a, we have a clear and undoubted right to an appeal as of right to the United States Supreme Court.

Bankruptcy Act, Sec. 24a;
Court of Appeals Act, 1891, Sec. 6.

In the cases which we shall now submit to the court, it clearly appears that this Honorable Court has already adopted the rule that cases like the present are included under Section 24a, that an appeal will lie under said section to the Supreme Court, and that the circumstance that a petition to review has also been filed under Section 24b, will be treated as immaterial.

Remington Bankruptcy Supp., *s.* 2918.

In *Hewitt* v. *Berlin Machine Works*, 194 U. S., 296, the trustee in bankruptcy applied to the district court for an order of sale of certain real estate, buildings and machinery. Notice to creditors was given, and thereafter the Berlin Machine Works filed a petition to be declared the owner of certain machines included in the property, claiming a lien under a conditional sale (p. 300), and to be awarded the possession thereof or that it be determined that the corporation be first paid out of the proceeds of the sale of the machines and to share in dividends on any unpaid balance.

The referee held that the corporation had lost the legal title to the machines. The district court reversed the decision of the referee. The trustee then filed a petition to revise and also appealed to the Circuit Court of Appeals. The Circuit Court of Appeals affirmed the judgment of the district court and an appeal was then taken to the Supreme Court of the United States. In its consideration of the case that court said:

> "If the trustee had carried the case to the Circuit Court of Appeals, on petition for supervision and revision under Section 24b of the bankruptcy law, the case would have fallen within *Holden* v. *Stratton*, 191 U. S., 115, and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession

of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Court of Appeals could, under Section 24a exercise appellate jurisdiction as in other cases. Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required, *Holden* v. *Stratton, supra,* while Section 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction, vested in them at law and in equity by Section 2, to settle the estates of bankrupts and to determine controversies in relation thereto, *Hutchinson* v. *Otis,* 190 U. S., 552; *Burleigh* v. *Foreman,* 125 Fed., 217.

"The appeal to this court then followed under Section 6 of the Act of March 3, 1891.

"This brings us to a consideration of the case on the merits."

Hewit v. *Berlin Machine Works,* 194 U. S., 296, 299.

In *Knapp* v. *Milwaukee Trust Company,* 216 U. S., 545, the Standard Telephone and Electric Company was adjudicated a bankrupt in the District Court of the United States for the Eastern District of Wisconsin. The trustee in bankruptcy filed a petition to sell all the property of the bankrupt. Knapp, as trustee of certain mortgages given by the telephone company, intervened, and asked to have the lien of the mortgage established as the first lien on the property and satisfied out of the proceeds of the sale. The property was sold, and the question was as to the lien of the mortgages upon the fund. We quote that part of the opinion material to the present controversy:

"The trustee in bankruptcy answered the petition of Knapp, trustee under the mortgage, averring that it was

a chattel mortgage, and fraudulent and void as to creditors, because of certain agreements contained therein, because it was on after-acquired property, and because of the failure to file an affidavit of renewal as required by the Wisconsin statutes. The referee in bankruptcy found the facts, and held the mortgage void. Upon hearing the District Judge reached a like conclusion.

. . . "The Circuit Court of Appeals of the Seventh Circuit, holding the mortgage void for the reasons set forth at large in the opinion of the District Judge.

. . .

"A motion has been filed to dismiss the appeal for want of findings of fact and conclusions of law in the Circuit Court of Appeals, as required by General Order in Bankruptcy XXXVI. Whether or not such a finding of facts was required depends upon the character of the present proceeding. General Order in Bankruptcy XXXVI, authorized under subdivision b of Sec. 25 of the Bankruptcy Act, provides for appeals under the Act to this court from the Circuit Court of Appeals within thirty days after the judgment or decree, and for the making and filing of a finding of facts and conclusions of law separately stated, and that the record upon such appeal shall consist only of the pleadings, the judgment or decree, the finding of facts and conclusions of law.

"Section 25b provides for appeals from any final decision of a Court of Appeals allowing or rejecting a claim under the Act, under such rules and within such time as may be prescribed by the Supreme Court of the United States. Such appeals are allowed when the amount in controversy exceeds the sum of $2,000, and the question involved might have been taken by appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or where some justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of the Bankruptcy Act throughout the United States.

"Under authority of subdivision b, Sec. 25, General Order XXXVI was adopted, and in the cases enumerated a finding of facts and conclusions of law must be made in the Circuit Court of Appeals and the appeal taken within thirty days after the entry of the judgment or decree.

"The case at bar is not of that class; it is an intervention in a bankruptcy proceeding, and, within the meaning of the act, a controversy arising in a bankruptcy proceeding, and the appellate jurisdiction is the same as in like cases under the Court of Appeals Act, Bankruptcy Act, Sec. 24a; *Hewit* v. *Berlin Machine Works*, 194 U. S., 296; *Coder* v. *Arts*, 213 U. S., 223, and cases therein cited.

"As the appeal was in the manner provided for in the Court of Appeals Act no special finding of facts was required under General Order XXXVI, and the motion to dismiss the appeal must be overruled."

Knapp v. *Milwaukee Trust Company*, 216 U. S., 545, 552, 553.

"It is . . . apparent that the mode of appeal in a given case depends upon the character of the proceeding. And the question to be solved in such cases is, Does the case present a proceeding in bankruptcy or is it a controversy arising in bankruptcy proceedings?

"A reference to the adjudications in this court may assist in clearing the matter. *Hewit* v. *Berlin Machine Works*, 194 U. S., 296, is an illustration of a controversey arising in bankruptcy proceedings (24a) wherein the appeal is under Sec. 6 of the act of March 3, 1891. In that case the Berlin Machine Works asserted title to the property in the possession of the trustee, and intervened in the bankruptcy proceedings, raising a distinct and separable issue as to the title to property in the possession of the trustee. This court speaking through the Chief Justice, held that the case presented a controversy arising in bankruptcy proceedings appealable to the courts of appeal as other cases under Sec. 6 of the act of March 3, 1891.

"We are thus brought to the determination of the question, Was the proceeding instituted by Arts a controversy arising in bankruptcy proceedings, or did he institute a bankruptcy proceeding, properly speaking, The answer to this question depends upon an examination of the manner in which the jurisdiction of the bankruptcy court was invoked for the determination of the rights involved. The record discloses that Arts filed in due form a claim upon the promissory notes, setting them forth in detail, asking that they be allowed as a proper claim against the assets in the hands of the trustee to be administered, described the mortgage as being the only security held by him for the payment of the debt, and concluded his claims with this statement: 'The deponent, in filing his claim herein against the bankrupt, does so with the express understanding that he makes no waiver of any portion of his security, and expressly reserves said security and every portion thereof to the amount of said claim, including the cost, if any, of collecting payment thereof out of said property held as security.'

"He thus in effect presented to the trustee in bankruptcy a claim upon his notes, joined with the statement that he had security upon the estate which it was his purpose to maintain, and upon which he was entitled to priority in the distribution of the assets. He did not, as was the case in *Hewit v. Berlin Machine Works, supra; York Manufacturing Company v. Cassell*, 201 U. S., 344; *Security Warehousing Co. v. Hand*, 206 U. S., 415, intervene in the bankruptcy proceedings for the purpose of asserting an independent and superior title to the property held by the trustees, claiming the right to recover the property and to remove it from the jurisdiction of the bankruptcy court as a part of the estate to be administered. Arts appeared in the bankruptcy court, recognizing the title and possession of the trustee in bankruptcy, asserted his claim upon the notes, and his right to have the assets so administered and paid as to recognize the validity of the lien

for the security for his claim. We are of opinion that he thus instituted a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings. This being the character of the proceeding, its subsequent disposition and the appropriate appellate jurisdiction are to be determined by the provisions of the bankruptcy act governing bankruptcy proceedings.

"It is true that Arts asserted both a debt and a lien to secure the same. In such cases the procedure as to the debt or claim governs, with incidental right to consider and determine the validity and priority of the lien asserted upon the property in the hands of the bankrupt's trustee. This method of procedure was recognized in *Hutchinson* v. *Otis*, 190 U. S., 552. In that case Otis, Wilcox & Company, having a claim for $4,421.64 had sued and attached the bankrupt's property within four months of filing the petition in bankruptcy. Otis, Wilcox & Company, supposing their attachment good, took judgment by default and collected their debts from the attached parties, the trustee agreeing to save them harmless from liability; satisfaction was entered in each suit. Subsequently the trustee demanded payment of those debtors of the bankrupt, and, as they had no defence, Otis, Wilcox & Company paid to the trustee the amount of the debts. Otis, Wilcox & Company then filed a claim in bankruptcy, which was allowed in the lower court; and they asserted a lien upon the bankrupt estate. After disposing of the question of the effect of the satisfaction, and deciding that the claim was provable, speaking of the asserted lien this court said:

" 'Under the circumstances of this case it seems to us that the petition (asserting the lien) was incident to the claim, *Cunningham* v. *German Insurance Bank*, 101 Fed. Rep. 977; . . . and was a bankruptcy proceeding under section 2, cl. 7, within the meaning of Section 25, regulating appeals in bankruptcy proceedings, and that the decree upon it was not, 'a judgment allowing or rejecting a debt or claim of five hun-

dred dollars or over,' within Section 25a, 3, and was not an independent ground of appeal. . . .

"The contest in the Otis case, as in this, was over the claim presented, and, incidentally, to establish a lien upon the bankrupt's estate."

Coder v. *Arts*, 213 U. S. 223, 233, 239.

"This is a bill in equity brought by a trustee in bankruptcy to set aside a transfer of accounts and bills receivable made by the bankrupt to the defendant Sugarman with intent to delay and defraud creditors. Sugarman pleaded in bar that the plaintiff had ratified his dealings, because, with knowledge of all the facts, the plaintiff had taken a judgment against the bankrupt for $17,500, a part, or all of which was money remaining in the bankrupt's hands of $30,000 alleged by the bill to have been paid to him by Sugarman in pursuance of the fraudulent scheme. A majority of the Circuit Court of Appeals held the ratification made out, on the ground that, to get the judgment, the trustee had to rely upon a right inconsistent with that now set up. 157 Fed. Rep. 669. The plaintiff appealed to this court.

"It is argued that the appeal is too late because not taken within thirty days after the decree, as required by General Orders in Bankruptcy No. 36, for appeals under the act. But this is not an appeal under the act, *s.* 25, by authority of which the General Order was adopted, and is not governed by that order. The appellate jurisdiction is under, or is the same as that under the Court of Appeals, Act of March 3, 1891, *c.* 517, *s.* 6 26 Stat. 828. *Knapp* v. *Milwaukee Trust Co.*, March 7, 1910, 216 U. S. 545. The appeal was taken within a year and was in time."

Thomas v. *Sugarman*, 218 U. S. 129, 133.

A summary of the facts in the preceding cases should aid the present discussion.

In the *Hewit* case the trustee applied for leave to sell certain property in his hands. Thereafter the Berlin Machine Works filed a petition asking to be declared owner of the

same, claiming a lien thereon. From the decision of the District Court the trustee appealed and also filed a petition to revise. The latter was treated as immaterial by the Supreme Court. An appeal was allowed by that court under section 6, of the Act of March 3, 1891, the court holding that the intervention of the Berlin Machine Works raised a distinct and separable issue and was a controversy within the meaning of Section 24a.

The *Knapp* case is similar to the *Hewit* case. The trustee filed a petition to be allowed to sell all the bankrupt's property. Knapp as trustee of certain mortgages given by the bankrupt, intervened and asked to have the lien of the mortgages established as the first lien on the property. The Supreme Court held this to be a controversy within the meaning of Section 24a, and appealable under Section 6 of the Act of March 3, 1891.

Coder v. *Arts* differs materially from the last two mentioned cases. Arts there presented his claim in due form, simply setting forth the fact that he held a mortgage as security for the payment of the same. He did not assert a title independent and superior to that of the trustee, but recognized the right of the bankruptcy court over the property, and asked to have his claim given priority. He instituted a proceeding in bankruptcy and the case did not come under the class specified in Section 24a.

But the case of *Thomas* v. *Sugarman* falls within that class. There the trustee brought a bill in equity to set aside fraudulent transfers and the defendant questioned his right to maintain his bill by reason of election and claimed the property adversely. The case went to the Circuit Court of Appeals on appeal from the District Court and was properly appealable from that court under Section 6 of the Act of March 3, 1891.

To review the proceeding in the present case. The first

move in the litigation was made by the Head & Dowst Company which brought suit in the state court to foreclose an alleged mechanic's lien. Attachment of the property in this suit was made within the four months previous to the filing of the petition to have the New England Breeders' Club adjudicated a bankrupt. There was danger of the trustee losing possession of the property in the proceeding in the state court, so a petition was filed by him April 14, 1908, seeking an injunction to restrain the defendant from proceeding there, and a temporary restraining order which was granted. The defendant entered its appearance specially and filed a petition June 11, 1908, asking to have the injunction dissolved, setting forth the fact of attachment in the state court and the proceedings incident thereto. It also alleged that the club was not one entitled to the benefit of the bankruptcy act and denied the District Court's jurisdiction. June 10, 1908, the trustee had also filed a petition to compel the defendant to adjudicate its adverse claim. February 18, 1909, in another proceeding [*In re New England Breeders' Club*, 169 Fed. (C. C. A. 1st Cir.) 586] it having been determined that the Club was entitled to be administered a bankrupt, the defendant here filed its answer March 18, 1909, to the trustee's petition to stay the suit pending in the state court. Therein it again set forth the proceedings in the state court, denied the fraudulent transfer alleged in the trustee's petition, denied the right of the District Court to stay the proceedings of the Head & Dowst Company in the State Court, and stated that it had never filed or proved any claim against the Club in the bankruptcy proceedings.

The District Court thereafter appointed a master to hear all the evidence relative to the petitions filed June 10, and June 11, 1908, the petition of trustee to adjudicate adverse claim, and of the defendant to dissolve the injunction, and

ordered the Head & Dowst Company to go forward upon the question of the validity of its alleged lien. The defendant excepted to this order as it had never appeared upon the petition to adjudicate its adverse claim. The evidence was thereafter fully presented to the Master, both as to the proceedings in the State Court and the facts surrounding the alleged lien. Upon consideration of the master's report the District Court decided that justice had been done, accepted the finding of the State Court that the lien was valid and dismissed the case, although deciding that the federal court had jurisdiction if it wished to exercise it to pass upon the merits of the defendant's claim of lien (175 Fed., 501, 504). An appeal was then taken to this court under Section 24a.

Now let us compare the present case with those cited. It has some of the characteristics of each. It is similar to *Thomas* v. *Sugarman*, in that the trustee filed the petition alleging fraud and connivance on the part of the defendant. It resembles the *Hewit* and *Knapp* cases because the defendant is asserting a claim to the property adverse to the trustee, and if upheld will result in the property passing entirely out of the hands of the trustee and out of the jurisdiction of the District Court. This case is similar to *Coder* v. *Arts* simply in that a lien is claimed, but it differs essentially because here no claim has been filed or proved by the defendant against the bankrupt estate. Its whole attitude is one denying the right of the trustee to handle the property as part of the bankrupt estate. Its position is an assertion of title to the property in the possession of the trustee, raising a distinct and separable issue as to the title of such property. This is not a contest over a lien incident to a claim proved against the bankrupt estate, for no claim has been proved or filed. It is a contest over the validity of a mechanic's lien, the determination of which will show

to whom the property belongs, the Dowst Company, or the trustee, to be administered as part of the bankrupt estate.

For these reasons the present appeal will lie as of right to the Supreme Court under Section 6 of the Act of March 3, 1891.

HENRY F. HOLLIS,
Of Counsel for Nathaniel W. Hobbs,
Trustee, Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 148.

NATHANIEL W. HOBBS, TRUSTEE, APPELLANT,

vs.

HEAD & DOWST COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF APPELLANT ON MOTION TO DISMISS.

Reasons Against Motion.

Upon oral argument we shall show that:

1. The officer of the Federal court (appellant) is in possession of real estate belonging to the bankrupt estate of the New England Breeders' Club:

2. That it is sought in this proceeding to wrest from the Federal court the real estate which that court holds for the benefit of the general creditors and bestow it upon the Head & Dowst Company (appellee) as a preferred creditor:

5

Office Supreme Court, U. S.
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No. 148.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

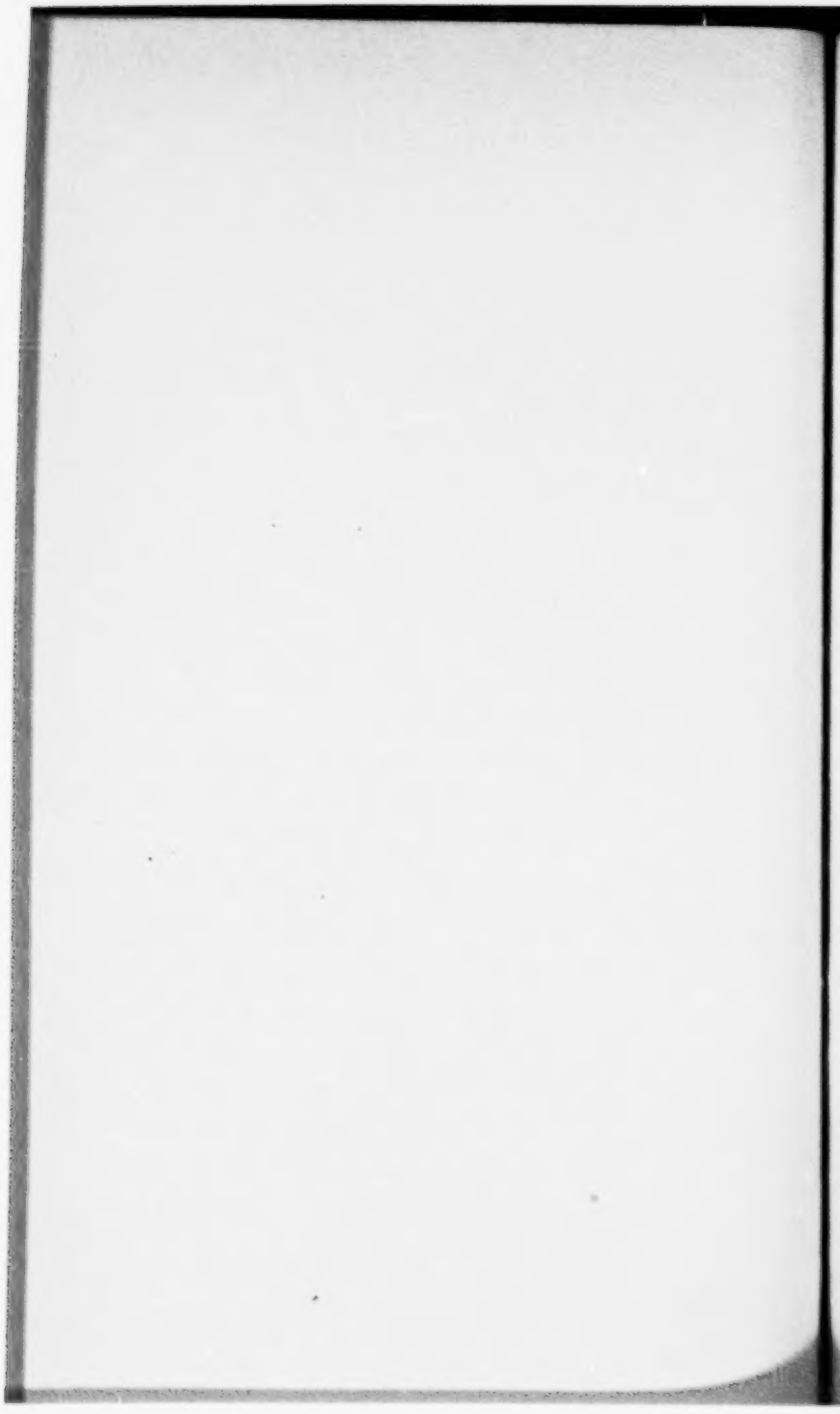
NATHANIEL W. HOBBS, Trustee,
Appellant,

v.

HEAD & DOWST COMPANY.

Appeal from the Circuit Court of Appeals for the First Circuit.

MOTION TO DISMISS FOR WANT OF JURISDICTION.



No. 148.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

NATHANIEL W. HOBBS, Trustee,
Appellant,

v.

HEAD & DOWST COMPANY.

Appeal from the Circuit Court of Appeals for the First Circuit.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Head & Dowst Company, Appellee, respectfully moves the court to dismiss the appeal in this case and assigns therefor the following reasons:

1. The Circuit Court of Appeals had no jurisdiction of the case on its merits, hence its decision cannot found an appeal to this court.

2. The appeal from the Circuit Court of Appeals was not taken within the thirty days prescribed by Rule XXXVI of the General Orders and Forms in Bankruptcy nor do any specific findings of fact and conclusions of law accompany this appeal as therein specified.

In support of this motion the following argument is submitted:

BRIEF STATEMENT OF CASE.

This case relates to a mechanic's lien claimed under the statutes of New Hampshire on the real estate of the New England Breeder's Club, appellant, (hereinafter referred to as the Club) now in bankruptcy. Head & Dowst Company (hereinafter referred to as the Company), appellee and lienor, constructed grandstands, stables and buildings of the Club for the contract price of $205,893.02. The Company had fully completed this contract except for the addition of certain shutters, etc., amounting in value of labor and materials to about one thousand dollars. At this stage the insolvency of the Club and its refusal and inability to make certain payments then due on the contract, compelled the Company to cease further operations. To this cessation the Club assented. *Record, pp.* 30, 70.

(*a*) December 24, 1906, the Company brought this action in the State courts to enforce its statutory lien, by attaching the real estate of the Club. April 19, 1907, the Club was petitioned into bankruptcy and December 31, 1907, was adjudged a bankrupt. Meanwhile the Company's action had been tried in the State Superior Court and the Company was awarded judgment *in rem,* for $46,748.08, the case being defended by the Assignee in insolvency who subsequently was appointed Trustee in bankruptcy. *Record, pp.* 13, 14, 32. The Assignee's exceptions to the verdict were overruled in the State Supreme Court, where he, as Trustee, declined to appear. Instead, he petitioned the District Court independently to adjudicate the lien question. Then the District Court enjoined the Company from further prosecuting its suit in the State court and referred the lien question to a Master. *Record, pp.* 4, 5, 11.

His report sustained all the Company's contentions and recommended dissolution of the restraining order. *Record, p.* 44. The District Court, however, directed the Trustee to obtain a hearing in the State Supreme Court on the exceptions which had been abandoned. *Record, p.* 50. This was granted, and after argument, the exceptions to the verdict were formally overruled, March 1, 1910. *Record, p.* 51.

(*b*) Thereupon the District Court, with the Master's report before him, accepted "the result reached in the State Court as sufficiently establishing the amount and validity" of the lien and dismissed the Trustee's petition to adjudicate independently the lien question. *Record, p.* 58. The Trustee took the case to the Circuit Court of Appeals, both by petition to revise and by appeal; but the petition was dismissed and the decree of the District Court on the appeal was affirmed. *Record, p.* 71. Then followed the present appeal.

I.

The Judgment of the State Court, Rendered Prior to the Adjudication of Bankruptcy, was Substantially Binding on the District Court; so that the Circuit Court of Appeals had no Jurisdiction Whereby to Determine the Lien Question on its Merits, and thereby Found a Right of Appeal.

The Company's claim to a lien on the property is based upon the provisions of Chapter 141 of the Public Statutes of New Hampshire, the material parts of which are as follows:

"Sec. 10. If a person shall, by himself or others, perform labor or furnish materials to the amount of fifteen dollars or more, for erecting, alter-

ing or repairing a house or other buildings, or appurtenances, by virtue of a contract with the owner thereof, he shall have a lien thereon and on any right of the owner to the lot of land on which the house, building or appurtenances stand."

"Sec. 16. The lien created by section ten (etc.) shall continue for ninety days after the services are performed, or the materials or supplies are furnished, unless (etc.)"

"Sec. 17. Any such lien may be secured by attachment of the property upon which it exists at any time while the lien continues, the writ and return thereon distinctly expressing that purpose."

In accordance with the provisions of this statute, the Company made its lien attachment on December 24, 1906; at that time the Club was legally a "going" concern; neither State insolvency proceedings nor the petition in bankruptcy came to pass until nearly four months later. *At the time the State court awarded judgment for the Company in this action, the Club had not been decreed a bankrupt.* The suit was defended by the Assignee in insolvency (who was later the Trustee in bankruptcy) and a full, complete and impartial trial was had. *Record, p.* 33. So the State court, then unhampered by any restraining order of the District Court, with the proper parties before it and with jurisdiction over the real estate under the lien attachment, applied the local law to a local question and rendered judgment on the merits of the case.

(*a*) As a consequence of these proceedings when the Trustee took the real estate of the Club it was cumbered with the judgment of the State court in the lien suit; that judgment the District Court, under the facts of the case, could not question on its merits; in other words, the Trustee took the

property in the plight in which he found it, bound by the State court's judgment in the premises.

Zartman v. *First Nat. Bank,* 216 U. S. 134.
York Mfg. Co. v. *Cassell,* 201 U. S. 344.
Humphrey v. *Tatman,* 198 U. S. 91.
Hewit v. *Berlin Mach. Works,* 194 U. S. 296.
Eyster v. *Gaff,* 91 U. S. 521.
In re Vastbinder, 132 Fed. 718.
Linstroth Wagon Co. v. *Ballew,* 149 Fed. 966.
In re Baughman, 138 Fed. 742.
In re New York Economical Printing Co., 110 Fed. 514.
Clark v. *Snelling,* 205 Fed. 240.
In re Platteville Foundry & Machine Co., 147 Fed. 828.

In *Thompson* v. *Fairbanks,* 196 U. S. 516, at page 526 is said: "Under the present bankrupt act the trustee takes the property of the bankrupt in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act."

It cannot be contended that the lien acquired by operation of the builder's contract, and perfected by the attachment in accordance with the State statute before quoted, was void or was dissolved by any provision of the bankruptcy act. This is settled by *Henderson* v. *Mayer,* 225 U. S. 631, wherein the court says: "But the statute was not intended to lessen rights which already existed, nor to defeat

those inchoate liens given by statute, of which all creditors were bound to take notice, and subject to which they are presumed to have contracted when they dealt with the insolvent.

"Liens in favor of laborers, mechanics, and contractors are of this character, and although they may be perfected by record or foreclosure within four months of the bankruptcy, they are not created by judgments, nor are they treated as having been 'obtained through legal proceedings' even when it is necessary to enforce them by some form of legal proceeding," *p.* 637.

On the contrary this lien falls within the scope of § 67 *d* which provided: "Liens given or accepted in good faith, and not in fraud upon this Act, and for a present consideration * * shall not be affected by this Act."

Remington, referring to a mechanic's lien, says:

"It is essentially and clearly a lien arising upon a presently passing consideration, and must be assumed to have been in the contemplation of the parties engaged in the work both as owners and contractors. Therefore, such a lien is one given and accepted upon a present consideration, and is within the meaning of clause (*d*) of Sec. 67, and is not a preference nor a lien obtained by legal proceedings."

2 Remington on Bankruptcy, 681.

The Master's report expressly negatives the giving of any preference by Mr. Miller, the agent of the Club, or any fraud by anyone connected with the case. *Record, p.* 44. Unless fraud appear the lien encumbrance is not one created by the act of the debtor, (Bankruptcy Act § 67 *e*), but rather by the lien statute. *In re Emslie,* 102 Fed. 291, 293.

It follows that the Superior Court of New Hampshire rightfully undertook original jurisdiction

of this lien question, and, having the proper parties before it, (*Record, p.* 68) proceeded to render judgment for the Company before the Club was adjudicated a bankrupt. Even if the plight of the bankrupt's property is determined by its status as of the date of the petition in bankruptcy, none the less the State court was adjudicating by virtue of an attachment undissolved and unimpaired, because the attachment lien was preserved rather than denounced by the bankruptcy act. Furthermore, of course, this judgment was rendered before any restraining or supervisory process or order had issued from the bankruptcy court. Not only did the State court have jurisdiction of the parties, and the property (although it may not have had actual *possession* of the latter), but it was adjudicating a question peculiarly within its sphere, that is, the validity of a lien under the statute law of the State. The decisions of the State tribunals on such questions are held controlling.

Eyster v. *Gaff*, 91 U. S. 521.
Knapp v. *Milwaukee Trust Co.*, 216 U. S. 545.
Thompson v. *Fairbanks*, 196 U. S. 516.
In re Grissler, 136 Fed. 754, 756.
Etheridge v. *Sperry*, 139 U. S. 266.
Phelps v. *Mut. Res. Fund Life Assn.*, 112 Fed. 453, 464.
In re Beede, 138 Fed. 441, 444.
In re Scruggs, 205 Fed 673.
In re United States Lumber Co., 206 Fed. 236, 238.
1 Loveland on Bankruptcy, *p.* 945.

Here not only is the law of New Hampshire settled under the statute in issue but is settled in the

very case at bar, on these same facts which the Trustee petitioned the District Court independently to adjudicate. There can be no dispute as to the law of New Hampshire for it has been determined in this very case, in a suit defended by the same party who is now the Trustee in bankruptcy. This controversy had been determined on its merits by the New Hampshire courts and if there is any virtue in the proposition that liens dependent upon local statutes are to be decided by the law as determined by the courts of the State, there was no field for the exercise of meritorious adjudication by either the District Court or the Circuit Court of Appeals. Hence when the latter court did essay to determine the lien question on its merits, the Company was injured, for although the decision of the court was entirely favorable to the Company, an appeal to this court was allowed, as the Appellee contends, erroneously.

(*b*) But herein another well established principle of law has equal application, namely, that where two courts have concurrent jurisdiction of the subject of an action, the one which first obtains jurisdiction of the controversy has the right to proceed to its final determination without interference from the other.

Peck v. *Jenness,* 7 How. 612.
Pickens v. *Roy,* 187 U. S. 177.
Metcalf v. *Barker,* 187 U. S. 165.
In re Rohrer, 177 Fed. 381.
Westfeldt v. *No. Car. Mining Co.*, 166 Fed. 706.
In re Gerdes, 102 Fed. 318.
Kimberly v. *Hartly,* 1 Fed. 571.

Such rule is not limited to cases in which the

court first obtaining jurisdiction has taken actual or constructive possession of the subject matter of the suit.

Westfeldt v. *No. Car. Mining Co.*, 166 Fed. 706.
Gates v. *Bucki*, 53 Fed. 961.
Vowinckel v. *N. Clark & Sons*, 162 Fed. 991.
Phelps v. *Mutual Reserve Fund Life Ass'n*, 112 Fed. 453.
Pitt v. *Rogers*, 104 Fed. 387.
Davis v. *Planters' Trust Co.*, 196 Fed. 970.
Bradley v. *United Wireless Telegraph Co.*, 79 N. J. Eq. 458.
Farmers' Loan & T. Co. v. *Lake Street Elevated R. Co.*, 177 U. S. 51.

In the latter case it is said at *p.* 61:

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts. *Peck* v. *Jenness*, 7 How. 612; *Freeman* v. *Howe*, 24 How. 450; *Moran* v. *Sturges*, 154 U. S. 256; *Central Nat. Bank* v. *Stevens*, 169 U. S. 432; *Harkrader* v. *Wadley*, 172 U. S. 148."

"And this rule, in its application to federal and state courts, being the outgrowth of necessity 'is a principle of right and law' which leaves nothing to

the discretion of a court, and may not be varied to suit the convenience of litigants."

Merritt v. *American Steel Barge Co.*, 79 Fed. 228, 231, and cases there cited.

The State court was proceeding to adjudicate under a mesne attachment; it gave judgment *in rem* to the Company for its lien claim. While the court did not have actual possession of the land, it had jurisdiction of both parties and its process of attachment put the land *in custodia legis*. The action in the State court required the control and dominion of the property involved. The levying of judgment would eliminate the title of the Club.

Davenport v. *Tilton*, 51 Mass. 320.
Kittredge v. *Warren*, 14 N. H. 509.
Palmer v. *Texas*, 212 U. S. 118.
Heidritter v. *Oil Cloth Co.*, 112 U. S. 305.

The determinative factor is the meaning of "possession," "custody," "control" or "dominion" as applied to the court attempting to exercise jurisdiction. In the case at bar the State court was proceeding to exercise jurisdiction under an attachment made almost four months before the date of the petition in bankruptcy; that attachment was not dissolved by the bankruptcy act, and by virtue of service on the Club and this attachment of its real estate the State court gave judgment *in rem* against the real estate *before* the adjudication in bankruptcy. The execution of that judgment against the real estate under the still puissant attachment would extinguish the Club's title to the land. It follows that the attachment although not giving the State court actual possession at the time, brought the property into the ultimate control of the State court, truly *in custodia legis*, and the equivalent to actual possession.

Cases in the Federal courts apparently opposed to the contention here, will doubtless be cited in the Trustee's brief to be filed, but upon scrutiny it is safe to assert that most of them will be examples of either (1) where the property was in the prior custody of the Federal courts, or (2) where the attachment itself under which the State court was attempting to exercise jurisdiction, was dissolved by the bankruptcy act so the jurisdiction was lost together with the attachment. The facts of the instant case are, however, distinctly otherwise.

It is true the District Court had a clear right to examine into the proceedings to determine if they were regular and perhaps, in accordance with fundamental rules as to litigated questions, (*Record, p.* 65). It also had undoubted power to inquire into the situation in order to determine questions of jurisdiction. *First National Bank* v. *Chicago Title & Trust Co.,* 198 U. S. 280; *Louisville Trust Co.* v. *Comingor,* 184 U. S. 18; *Mueller* v. *Nugent,* 184 U. S. 1; *Schueer* v. *Brown,* 195 U. S. 171; *Linstroth Wagon Co.* v. *Ballew,* 149 Fed. 960; *Shea* v. *Lewis,* 206 Fed. 877; *In re Baird,* 116 Fed. 765; *In re Kane,* 131 Fed. 386; *In re Rathman,* 183 Fed. 913. This the District Court did, and after due consideration of the proceedings as determined by the Master's report, *it accepted the* judgment of the State courts as conclusive (*Record, pp.* 58, 65) and properly dismissed the Trustee's petition to independently adjudicate the lien question further.

Further than this the District Court and the Circuit Court of Appeals had no jurisdiction. The Company, proceeding in the State courts before the inception of bankruptcy proceedings, by virtue of its lien attachment, which for jurisdictional purposes was equivalent to actual possession of the land, was

an *adverse claimant* as much as a claimant of absolute title, within the meaning of section 23 of the Bankruptcy Act. *Jaquith* v. *Rowley*, 188 U. S. 620; *Harris* v. *First National Bank*, 216 U. S. 382; *Frank* v. *Volkommer*, 205 U. S. 521; *In re Mimms & Parham*, 193 Fed. 276; *In re Rathman*, 183 Fed. 913.

The Company has never filed a claim in the bankruptcy court; it has never appeared voluntarily in the Federal courts; a discharge in bankruptcy would not operate as a release of this lien claim. It follows that the District Court might not properly stay these proceedings in the State courts. Power vested by section 11a of the Bankruptcy Act to stay a suit founded upon a claim from which a discharge would be a release, is not applicable to a proceeding *in rem* where the State court has acquired an indefeasible jurisdiction; the Trustee's only remedy in such cases is by plenary proceeding in the State courts.

Louisville Trust Co. v. *Comingor*, 184 U. S. 18.
First Nat. Bank v. *Chicago Title & T. Co.*, 198 U. S. 280.
Bardes v. *Hawarden Bank*, 178 U. S. 524.
Babbitt v. *Dutcher*, 216 U. S. 102.
Tennessee Marble Producer Co. v. *Grant*, 135 Fed. 322.
In re Rohrer, 177 Fed. 381.
In re Wagner's Estate, 206 Fed. 364.
In re Mimms & Parham, 193 Fed. 276.
Shea v. *Lewis*, 206 Fed. 139.
In re Henderson, 206 Fed. 139.
In re Grissler, 136 Fed. 754.
In re Kane, 152 Fed. 587.
1 Loveland on Bankruptcy, *p.* 159.

The Trustee had his day in the State courts on the questions of merit at issue in this case, when the District Judge instructed him to try out the exceptions to the judgment of the Superior Court, taken by him as Assignee in insolvency and abandoned by him as Trustee in bankruptcy.

When the Trustee took an appeal, the District Court reserved to the Circuit Court of Appeals such discretion as it had in the premises. Perhaps it had such power. But when the Circuit Court of Appeals undertook to determine the lien *question on its merits*, it is respectfully submitted, that court exceeded its jurisdiction; and although the decision was in accord with that of the State court, and the District Court, the effect of the meritorious decision was to bottom an appeal to this court. Accordingly this appeal should be dismissed, in accordance with the Company's motion to that effect.

II.

The Case Presents a Proceeding in Bankruptcy rather than a Controversy Arising in Bankruptcy Proceedings.

The test to determine this proposition depends upon the manner in which the jurisdiction of the bankruptcy court was invoked for the determination of the rights involved. *Coder* v. *Arts*, 213 U. S. 223; *In re Jungman*, 186 Fed. 302. This proceeding was initiated by the Trustee in bankruptcy who petitioned the District Court to stay further proceedings in the State courts and to adjudicate independently of those courts, the lien of the Company in order that the estate of the bankrupt might be properly administered and the real estate sold. *Record, pp.* 1, 2, 5, 6.

Thereby he instituted a proceeding in bankruptcy, looking to reducing the estate to money, marshalling the assets and determining the encumbrances upon the real estate of the bankrupt. *Hutchinson* v. *Otis*, 190 U. S. 552. Its result has been a practical retrial of the lien question in the Federal courts against the objection of the Company. The latter has not disputed with the Trustee the title to the property or his possession of it. On the contrary it has always recognized both title and possession as being in the Trustee and has merely sought to prove its lien claim under its attachment. It did not, as was the case in *Hewit* v. *Berlin Machine Works*, 194 U. S. 296, *York Mfg. Co.* v. *Cassell*, 201 U. S. 344, *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, and *Knapp* v. *Milwaukee Trust Co.*, 216 U. S. 545, intervene in the bankruptcy proceedings and assert an independent and superior title to the Trustee's. It was dragged into the bankruptcy forum and the validity of its claim against the bankrupt's property was determined without its assent, although in its favor.

If the *manner* in which the jurisdiction of the bankruptcy court was invoked is the determining characteristic of a proceeding in bankruptcy (*Coder* v. *Arts*, 213 U. S. 223) surely exercising the jurisdiction by summary procedure, — by restraining further action in the State courts, and by referring all the facts relating to the lien question to a Master and acting upon the latter's report — is a typical example of a proceeding in bankruptcy. An action begun by summary process is not ordinarily "a controversy in bankruptcy." *In re Rathman*, 183 Fed. 913, 918.

The determination of lien questions, involved in the marshalling of assets and the clearing of en-

cumbrances from the bankrupt's property, is normally peculiar and incidental to proceedings in bankruptcy.

Coder v. *Arts*, 213 U. S. 223.
Whitney v. *Wenman*, 198 U. S. 539.
First Nat. Bank v. *Chi. Title & Trust Co.*, 198 U. S. 280.
In re Lee, 182 Fed. 579.
In re Farrell, 176 Fed. 505.
In re McMahon, 147 Fed. 684.
In re Streator Metal Stamping Co., 205 Fed. 280.
Morgan v. *First Nat. Bank*, 145 Fed. 466.
In re Kellogg, 121 Fed. 333.
1 Loveland (4th ed.) *p.* 91.

Here the Company was compelled to litigate its lien, the same as if it had filed a claim against the bankrupt estate as in *Coder* v. *Arts* above; it claimed no specific property, it merely asked payment of a debt the owing of which is not disputed. The lien was but an incident of the debt as the *Coder* case holds. The case could not have arisen in the District Court apart from bankruptcy because there was no diversity of citizenship or other element necessary to give Federal jurisdiction. The Trustee took the case to the Circuit Court of Appeals both by petition to review under 24 b of the Bankruptcy Act and by appeal. The former was dismissed for want of jurisdiction. *Record pp.* 71, 76. This, it is submitted, was error. The appeal was adjudicated on its merits which also, it is submitted, was error. The appeal to this Court was not taken within thirty days of the judgment in the Circuit Court of Appeals (Rule 36), and hence must fail.

SUMMARY.

Apparently no other reported case presents the precise situation of the one at bar. Here is a case where a lien attachment is made, before the petition in bankruptcy; where trial is had in the State court, and judgment *in rem* ordered for the lienor before the adjudication in bankruptcy; where, thereafter, the District Court, in bankruptcy, restrains the further prosecution of the action in the State courts, determines the facts of the lien question through a Master; where the District Court thereupon adopts as conclusive the result in the State court, after sending the Trustee (who had defended the suit as Assignee in the State court) back into the State courts to argue the exceptions (claimed as Assignee in insolvency and abandoned as Trustee in bankruptcy) taken during the course of the trial; where the District Court dismisses the petition to independently adjudicate the lien question further than to accept the result reached in the State courts; where the Trustee then takes his matter to the Circuit Court of Appeals both by petition to revise and by appeal, and finally where that court dismisses both appellate proceedings, the former for want of jurisdiction and the latter after judgment on its merits, and then allows an appeal to this court under the Judiciary Act of 1891, Sec. 6; and during all this time the Company, lienor, has filed no claim in bankruptcy and has consistently and persistently objected to the exercise of the Federal jurisdiction over it; and yet every step in this litigation in the State trial court, before the Federal Master, the State Supreme Court, the opinion of the District Court, the decision of the Circuit Court of Appeals and a supplementary opinion on the motion for a rehearing has marked a decision favorable to the lienor, sustaining completely

its claim to a valid lien on the merits of the cause.

This exposition of the trial history of the case at bar would seem to suggest an error in the exercise of jurisdiction somewhere along the line. The State court, "was careful at the crucial stage of the proceedings to have before it parties who * * in a broad sense are the same as now before us" and did not proceed "against common right, or in violation of the fundamental rules of law" (*Per* Putnam J. in the Circuit Court of Appeals). *Record, p.* 68. *Cf.* also *Record, p.* 66. The attachment by which it acquired jurisdiction of the *res* was not impaired by the bankruptcy act. *It must follow then, of necessity, either (1) that the jurisdiction of the State court had attached indefeasibly (Peck* v. *Jenness,* 7 How. 612) because although the State court did not acquire actual *possession* of the *res* the property was *in custodia legis* for, on levy of execution by virtue of the unimpaired attachment, the title of the bankrupt would be extinguished, or (2) that the judgment was transferred to the jurisdiction of the Federal Court as an established lien on the property, subject only to a general supervisory consideration, (*Linstroth Wagon Co.* v. *Ballew,* 149 Fed. 960) or (3) the effect of the proceedings in the District Court was to set up a "proceeding in bankruptcy" from which no appeal lay to the Circuit Court of Appeals.

In any one of these situations, it is respectfully submitted, an appeal to this court was improperly allowed and the case should be dismissed for want of jurisdiction.

ROBERT L. MANNING, *of Counsel,*
appearing specially for
HEAD & DOWST COMPANY, *Appellee.*

Nov. 28, 1913.

Office Supreme Court, U. S.
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No. 148.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

NATHANIEL W. HOBBS, Trustee,
Appellant,

v.

HEAD & DOWST COMPANY.

Appeal from the Circuit Court of Appeals for the First Circuit.

MOTION TO DISMISS.

THE NUTFIELD PRESS, MANCHESTER, N. H.

No. 148.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

NATHANIEL W. HOBBS, Trustee,
Appellant,

v.

HEAD & DOWST COMPANY.

Appeal from the Circuit Court of Appeals for the First Circuit.

MOTION TO DISMISS.

Appellee, Head & Dowst Company, moves the court to dismiss the appeal in this case.

REASONS FOR MOTION.

The successive decisions of the State Court, of the District Court and of the Circuit Court of Appeals (including an opinion on a motion for rehearing) "proceeded on well settled principles of general law," (*Chapman* v. *Bowen*, 207 U. S. 89) and dealt with the same questions here sought to be raised. This appeal, it is submitted, was taken solely for the purpose of delay and is based upon a proposition which justifies no further argument. The law of the case was determined in *Rochm* v. *Horst*, 178 U. S. 1, and in the decision of the Supreme Court of New Hampshire reported in 75 N. H. 449, on these identical facts between these same parties.

STATEMENT OF CASE.

This case relates to a mechanic's lien claimed under the statutes of New Hampshire on the real estate of the New England Breeder's Club, now in bankruptcy. Head & Dowst Company, appellee and lienor, constructed grandstands, stables and buildings of the Club for the contract price of $205,893.02. The Company had fully completed this contract except for the addition of certain shutters, etc., amounting in value of labor and materials to about one thousand dollars. At this stage the insolvency of the Club and its refusal and inability to make certain payments then due on the contract, compelled the Company to cease further operations. To this cessation the Club assented.

(*a*) December 24, 1906, the Company brought this action in the State courts to enforce its statutory lien, by attaching the real estate of the Club. April 19, 1907, the Club was petitioned into bankruptcy and December 31, 1907, was adjudged a bankrupt. Meanwhile the Company's action had been tried in the Superior Court. The Company was awarded judgment *in rem*, for $46,748.08, the case being defended by the Assignee in insolvency who subsequently was appointed Trustee in bankruptcy. The Assignee's exceptions to the verdict were overruled, he as Trustee, declining to appear. Instead, he petitioned the District Court independently to adjudicate the lien question. Then the District Court enjoined the Company from further prosecuting its suit in the State court and referred the lien question to a Master. His report sustained all the Company's contentions and recommended dissolution of the restraining order. The District Court, however, directed the Trustee to obtain a hearing in the State Supreme Court on the exceptions which had been

abandoned. This was granted, and after argument, the exceptions to the verdict were formally overruled, March 1, 1910.

(*b*) Thereupon the District Court, with the Master's report before him, accepted "the result reached in the State Court as sufficiently establishing the amount and validity" of the lien and dismissed the Trustee's petition. The Trustee appealed to the Circuit Court of Appeals but his appeal was dismissed, and the decree of the District Court was affirmed. Then followed the present appeal.

ARGUMENT.

The only question now open is the same that has been decided adversely to the Trustee by three different tribunals (as well as in a Master's report) viz: (1) the State Superior Court, (2) the United States District Court and (3) the Circuit Court of Appeals,—which also filed an additional opinion on the same question, on the motion for rehearing.

The appellant's proposition is just this: that because the Company did not complete the contract in its entirety, *after the Club had become insolvent and itself had breached and abandoned the contract*, the Company cannot maintain any lien for the work actually done, even *although this amount represented a practical completion of the contract.*

It is submitted that this proposition, under the circumstances of the case, at least, is frivolous.

1. The State Court had original jurisdiction; it had these parties before it; it applied the local law—the lien statute of the State—to the facts of the case; the lien attachment was preserved, not dissolved, by the bankruptcy act; the decision of the State Court should be decisive; the District Court properly accepted "the result reached in the

State Court as sufficiently establishing the amount and validity" of the lien.

"The consequence is that in any event the Head & Dowst Company was entitled to proceed to enforce its lien for the balance due it,—and that in any view the adjudication of the State courts with reference to this, which is the substantial question in the case, cannot be disturbed." Putnam, J. Opinion in the Circuit Court of Appeals. Record, *p.* 71.

2. It is the law in New Hampshire (***Bank Commissioners*** v. ***Trust Co.***, 69 N. H. 621, 623) as it is elsewhere (***Anvil Mining Co.*** v. ***Humble***, 153 U. S. 540) that upon breach of an executory contract by one party thereto the other may cease performance and sue upon the contract. *"This rule is so fundamental as to dispose of the merits of these proceedings in any possible view that can be taken of them, or of what occurred in the courts of New Hampshire."* [Italics ours.] Putnam, J., on the motion for a rehearing in the Circuit Court of Appeals. Record, *p.* 76.

That the plaintiff lienor in such a case is not entitled to perfect his lien unless he complete *in toto* the contract which has been breached by the insolvency of the other party—that is, in a case of insolvency unless he increase the existing indebtedness to the full amount of the contract price,—runs as counter to the principles of justice and common sense as it is contrary to the law of the land.

It is respectfully submitted that the appeal should be dismissed.

ROBERT L. MANNING, *of Counsel,*
appearing specially for
HEAD & DOWST COMPANY, *Appellee.*

Sept. 22, 1913.

Office Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 148.

NATHANIEL W. HOBBS, Trustee,
Appellant,

v.

HEAD & DOWST COMPANY.

Brief for Head & Dowst Company

by

ROBERT L. MANNING
of Counsel.

No. 148.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

NATHANIEL W. HOBBS, Trustee,
Appellant,

v.

HEAD & DOWST COMPANY.

Brief for Head & Dowst Company.

The facts in the case at bar have been determined in the State courts, and also, in the Federal forum, by a Master, by the District Court and by the Circuit Court of Appeals. These several tribunals are in complete accord upon every issue of fact and law raised in the proceedings relative to the lien. Their findings sustain every contention of the Head & Dowst Company, Appellee, hereinafter referred to as the Company. "It (*i. e.* the State Supreme Court) did, however, hold that all the facts essential to the creation and preservation of the lien had been found for the plaintiff in the Superior Court." Putnam, J. in the Circuit Court of Appeals, *Record, p.* 65. The correctness of these conclusions of fact cannot successfully be questioned further in this court.

In *Page* v. *Rogers*, 211 U. S. 575, Mr. Justice Moody says, *page* 577,

> But the rule is well established that where two courts have concurred in findings of facts in equity, this court will accept those findings, unless clear error is shown. *Dun* v. *Lumberman's Credit Asso.*, 209 U. S. 20.

United States v. *Clark*, 200 U.S. 601, 608.
United States v. *Stinson*, 197 U. S. 200, 207.
Oceanic Steam Nav. Co. v. *Aitken*, 196 U. S. 589, 595.
Illinois ex rel. Hunt v. *Illinois C. R. Co.*, 184 U. S. 77, 98.

In *Furrer* v. *Ferris*, 145 U. S. 132, Mr. Justice Brewer says:

> The cause was referred to a master to take testimony therein 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Tilghman* v. *Proctor*, 125 U. S. 136; *Kimberly* v. *Arms*, 129 U. S. 512; *Evans* v. *State Bank*, 141 U. S. 107.
>
> *Furrer* v. *Ferris*, 145 U. S. 132, 134.

Again, to quote this Court:

> Upon the merits of the case, the two courts below have come to the same conclusion. The general finding of the trial court in favor of the complainants was a finding in their favor of all the material facts alleged in the amended bill, and those facts have been repeated and affirmed in the court of appeals, and we are now asked to review and reverse those findings upon the testimony contained in the record. It ought not to be done in this case. It is the settled doctrine of this court that the concurrent decisions of two

courts upon a question of fact will be followed, unless shown to be clearly erroneous. *The Carib Prince,* 170 U.S. 655, 658, *sub nom. Wuppermann* v. *The Carib Prince,* and cases there cited.

Brainard v. *Buck,* 184 U. S. 99, 104.

Schwartz v. *Duss,* 187 U. S. 8, 26.

Hy-Yu-Tse-Mil-Kin v. *Smith,* 194 U. S. 401, 412.

There was ample evidence to sustain the following conclusions by the several tribunals, which are here material.

1. The contract price for the construction of the grand stands, stables, etc., was $205,893.02. The Company had earned all but $1000. of this sum, for some shutters, when the insolvency of the New England Breeders' Club, Appellant (hereinafter referred to as the Club), and its refusal and inability to make certain payments then due upon the contract compelled the Company to cease further operations. To this cessation the Club assented and abandoned the contract. *Record, pp.* 30, 31, 62, 70.

2. Miller, president of the Club, was for the purposes of the case, practically the corporation; "it is apparent that the entire subject matter of the work contracted for by the Head & Dowst Company had by acquiescence, come under his sole charge." *Record, p.* 69.

If any question of law is now open it is that already presented to the State courts, the District Court and the Circuit Court of Appeals (*Record, pp.* 69, 71), namely whether a contractor who has already executed all but one thousand dollars' worth of work on a $205,893 undertaking, must complete the contract in its entirety in order to claim a builder's lien when at that stage the other party has become bankrupt, abandoned the contract, declined to pay the balance due of $45,995, and informed the contractor he must look to his lien for satisfaction.

The State courts have determined the question in favor of the Company, the lienor. As it is a well established doctrine that the decisions of the State courts construing their lien statutes are controlling on the Federal Courts (Company's Brief on Motion to Dismiss for Want of Jurisdiction, *p.* 7), it would seem that the question were already determined,—"that in any view the adjudication of the State courts with reference to this, which is the substantial question in the case, cannot be disturbed." Putnam, J., in the Circuit Court of Appeals, *Record, p.* 71. Hence the Company raised the question of jurisdiction by its motion and the accompanying brief.

ARGUMENT.

The action of the Company to enforce its lien claim was based upon the original contract. *Record, pp.* 32, 62. The Company is entitled to its judgment *in rem* against the real estate it specifically attached in accordance with the requirement of the New Hampshire statute, because,

1. It substantially completed the contract.
2. The Club breached the contract by refusing to pay instalments due and payable under the contract, and by reason of its insolvency and abandonment of the contract, justified the Company's action.
3. The Club waived absolute completion.

1. The Contract was Substantially Completed.

The contract price, including additions, for constructing the grandstands, stables, buildings, fences, etc., was $205,893.02. This work had been completed except furnishing certain shutters for the grandstand, of the contract price of $1000. *Record, pp.* 30, 62. It is submitted as a matter of fact that this was a substantial completion of the contract. Mathematically all but 1000/205,893 of the contract

price had been put into the structures; in other words the contract was more than 99-1/2% finished. The part uncompleted represented some shutters which were not essential to the use of the plant for the purpose designed, as is shown by the holding of a race meet before work under the contract was stopped. *Record, pp.* 26, 31. These facts being undisputed, the conclusion is as much for the court as a jury. That conclusion must be that the contract was substantially completed. No question of the Company's good faith is raised.

When the contract is substantially completed, the contractor is entitled to his lien. "This is an application of a rule of common law to suits for the enforcement of mechanics' liens."

Bergfors v. *Caron*, 190 Mass. 168.
Hobart v. *Reeves*, 73 Ill. 527.
Hankee v. *Arundel Realty Co.*, 98 Minn. 219.
Nolan v. *Whitney*, 88 N. Y. 648.
Phillip v. *Gallant*, 62 N. Y. 256.
McCue v. *Whitwell*, 156 Mass. 205.
Dyer v. *Lintz*, 76 N. J. L. 204.
Sherry v. *Madler*, 123 Wis. 621.
Kane v. *Stone Co.*, 39 Ohio St. 1.
Rockel on Mechanics' Liens, *s.* 49.
Horn v. *Batchelder*, 41 N. H. 86.
27 Cyc. 85.

> Substantial performance * * permits only such omissions or deviations from the contract as are inadvertent and unintentional, and are not due to bad faith, do not impair the structure as a whole, are remediable without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice be compensated for by deductions from the contract price. *Spence* v. *Ham*, 27 App. Div. 379. N. Y.

Hall v. *Long*, 68 N. Y. Supp. 522, 524.

In speaking of this requirement it has been said:

> But this is not a technical rule. It does not apply to immaterial points but to the substantial requirements of the contract. If the work was substantially completed, then the plaintiff is entitled to recover as much as the materials and work were worth, as determined by the contract price.

Kane v. *Stone*, 39 Ohio St. 1.
Moore v. *Carter*, 146 Pa. St. 492.
Rockel on Mechanic's Liens, *s.* 49, 127.
Moore v. *Dugan*, 179 Mass. 153.
Horn v. *Batchelder*, 41 N. H. 86.
27 Cyc. 85.

2. The Club Breached the Contract by Refusing to Pay Instalments Due, and, by Reason of its Insolvency and Abandonment of the Contract Justified the Company's Action in the Premises.

It is found as a fact by the State Superior Court, (*Record, pp.* 52, 65), and by the Master, (*Record, p.* 30), that "the failure on the part of the Breeders' Club to make its payments under the contract constituted such a breach of the contract on its part as to entirely warrant the Head & Dowst Company in abandoning further work under the contract." These facts the District Court considered and accepted in formulating its decree declining "to independently consider and adjudicate the local lien question further than to accept as conclusive the result reached in the State Court." *Record, p.* 58. The Circuit Court of Appeals found as a fact that there "was no substantial variance between the proofs offered in the Superior Court and those afterward presented in the District Court" (*Record, p.* 63); that the Supreme Court held "that all the facts essential to

the creation and preservation of the lien had been found for the plaintiff in the Superior Court" (*Record, p.* 65); that the whole amount reserved by the contract was due and payable at the time suit was brought (*Record, p.* 62); and that the New England Breeders' Club was "hopelessly insolvent" and had abandoned the contract. (*Record, p.* 70).

In the case of an executory contract partially performed, several situations will warrant the promissor—the plaintiff—in treating the contract as breached by the other party; he may then cease to perform his part and seek an appropriate remedy.

Thus (1) insolvency of the defendant may justify such action, or (2) failure to pay instalments due under the contract, or (3) renunciation or abandonment of the contract by the defendant. These three situations are presented by the instant case. There are two other grounds, not here material, *viz.*, interference and prevention by the defendant or his voluntary disablement of performance.

1. In Elliott on Contracts it is said:

> While insolvency of itself is not a breach of contract and does not authorize rescission, there may be such an admission of the insolvency as amounts to a declaration of intention not to abide by the contract, and it may operate as a renunciation. 3 *Elliott on Contracts, p.* 226, citing:
>
> *In re Phoenix Bessemer Steel Co.,* L. R. 4 Ch. Div. 108.
> *Ex parte Stapleton,* L. R. 10 Ch. Div. 586.
> *McKenzie* v. *Weinnman,* 116 Ala. 194.
> *Freeman* v. *Topkis,* 1 Mar. (Del.) 174.
> *Dorman* v. *Weakly,* 39 S. W. 890. (Tenn.).
> *Hallacher* v. *Henlien,* 39 S. W. 869 (Tenn.).

The Circuit Court of Appeals for the Sixth Circuit declares by Mr. Justice Lurton: "Bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation, subject only to the right of the trustee, at his election, to rehabilitate the contract by performance" *In re Neff*, 157 Fed. 57, 61.

Lovell v. *St. Louis Life Ins. Co.*, 111 U. S. 264, is another Federal case in point and an application of the principle is presented in *Bank Commissioners* v. *Trust Co.*, 69 N. H. 621, 623.

2. Failure to pay instalments due under the contract may amount to a renunciation by the defendant and justify cessation of work under the contract.

Freeto v. *Houghton*, 58 N. H. 100, 101.
Canal Co. v. *Gordon*, 6 Wall. 561, 569.
Thomas v. *Stewart*, 132 N. Y. 580, 582.
Woolf v. *Shaefer*, 103 N. Y. App. Div. 567.
Hall v. *Long*, 68 N. Y. Supp. 522.
Huetter v. *Redhead*, 31 Wash. 320.
Eastern Forge Co. v. *Corbin*, 182 Mass. 590, 593.
Johnson Forge Co. v. *Corbin*, 3 Penne. 342 (Del.)

This is entirely logical and just. The failure to pay an instalment may so cripple the contractor as to render it impossible to pay his help or purchase materials necessary for the continuance of work. Some such reason as this may be the foundation for the Master's finding that "the failure on the part of the Breeders' Club to make its payments under the contract constituted such a breach of the contract on its part as to entirely warrant the Head & Dowst Company in abandoning further work under the contract." *Record, p.* 30.

Yet, if the impossibility arises, directly, or

even indirectly, from the acts of the promissee, it is a sufficient excuse for non-performance. This is upon the principle that he who prevents a thing may not avail himself of the non-performance which he has occasioned. (*Dolan* v. *Rodgers*, 149 N. Y. 489, 491).

Vandegrift v. *Cowles Eng'r Co.*, 161, N.Y. 435, 443.

3. If the defendant repudiates or abandons the contract before its completion that "dispenses" the contractor from his part of the agreement. *Holt* v. *United Security Life Insurance Co.*, 74 N. J. L. 795, 801. This, of course, is elemental. The conflict—or rather discussion—for the doctrine is settled, comes when a remedy is sought by the contractor.

In *Hochster* v. *De La Tour*, 2 El. & B. 678, Lord Campbell enunciated the doctrine that is now accepted almost universally:

> If it should be held that, upon a contract to do an act upon a future date, renunciation of the contract by one party dispenses with the condition to be performed in the meantime by the other, there seems no reason for requiring the other to wait until the date arrives before seeking his remedy by action, and the only ground upon which the condition can be dispensed with seems to be the renunciation, which may be treated as breach of contract.

It is the firmly established law of the Federal forum, that in such a case the injured party may, if he desire, sue at once upon the contract and recover damages for the breach.

Roehm v. *Horst*, 178 U. S. 1.

Roehm agreed to purchase hops of Horst Bros. to be delivered in shipments at different times during five years. Roehm repudiated all liability for certain shipments before the time set for their de-

livery. Horst began his action before the date set for delivery. Mr. Chief Justice Fuller stated the question: "Where the contract is renounced before performance is due, and the renunciation goes to the whole contract and is absolute and unequivocal, the injured party may treat the breach as complete and bring the action at once." *p.* 8. In a lengthy and learned opinion where the conflicting doctrines are analyzed, the court holds "that the absolute renunciation of particular contracts constitutes such a breach as to justify immediate action and recovery therefor (*p.* 19), and that the rule laid down in *Hochster* v. *De La Tour* is a reasonable and proper rule to be applied in this case and in many others arising out of the transactions of commerce of the present day." *p.* 20.

In Wald's Pollock on Contracts, the question is thoroughly discussed and unqualified approbation expressed of the established rule, supported by many authorities, that the plaintiff may cease performance upon the defendant's repudiation, and yet sue upon the contract, *pp.* 351, 352 and notes. And, although not approving the reasoning of the cases, the author admits that it is the settled law of England, and Canada, and in the Federal Courts and a majority of the State courts, that the plaintiff in such cases has an immediate right of action, *pp.* 355, 361 and notes.

Cf. 3 Elliott on Contracts, sec. 2030.
O'Neil v. *Supreme Council*, 70 N. J. L. 410.

The doctrine of *Rochm* v. *Horst* was approved in *The Eliza Lines*, 199 U. S. 119, and has been followed and applied in the Federal forum continuously.

In re Neff, 157 Fed. 57.
McBath v. *Jones Cotton Co.*, 149 Fed. 383.
Michigan Yacht Co. v. *Busch*, 143 Fed. 939.
In re Stern, 116 Fed. 604.

In *Anvil Mining Co.* v. *Humble*, 153 U. S. 540,

the latter had a contract to mine all ore in certain parts of the Company's mine and was proceeding with the work when the Company interfered and prevented progress, thus breaching the contract. Plaintiff then abandoned further work and sued for damages on the contract; he was held justified in so doing, the court saying:

> Such an abandonment is not technically a rescission of the contract but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. *p.* 552.

In re Neff above, points out how the Federal courts in bankruptcy have applied the principle on the reasoning that "bankruptcy is a complete disablement from performance and the equivalent of an out and out repudiation." *In re Neff*, 157 Fed. 57, 61. Consequently claims are provable for damages for executory contracts breached by the bankruptcy.

> *Lovell* v. *St. Louis Life Ins. Co.*, 111 U. S. 264.
> *Carr* v. *Hamilton*, 129 U. S. 669.
> *In re Swift*, 112 Fed. 315.
> *In re Pettingill*, 137 Fed. 143.

That in case of breach of an executory contract, the injured party may at his election bring an action on the contract to recover damages for its breach or recover the value of the consideration furnished on a *quantum meruit* is the law in New Hampshire.

It is said:

> So, too, the authorities are clear, explicit and uniform, that where money has been paid, goods sold and delivered, or services rendered, upon a contract executory on the part of him who receives the money or goods, or for whom the services are performed, and he rescinds the con-

tract, or wholly fails to comply with its requisitions, or refuses to perform an essential part of the entire contract, the injured party, who has paid the money, sold and delivered the goods, or performed the services, has an election, either to bring an action upon the contract, to recover damages for its breach, or to consider the contract as rescinded, and bring his action of general *indebitatus assumpsit*, to recover back the money, or to recover the value of the goods sold and delivered, or of the services rendered. *Luey* v. *Bundy*, 9. N. H. 298, and authorities; *Deming* v. *Comings*, 11 N. H. 474; *Snow* v. *Prescott*, 12 N. H. 535; *Brown* v. *Mahurin*, *ante*, 156; *Pierce* v. *Duncan*, 22 N. H. 18; *Allen* v. *Webb*, 24 N. H. 278.

Drew v. *Claggett*, 39 N. H. 431, 433.

The doctrine is applied in a recent New Hampshire case involving the insolvency of a trust company. The company pledged real estate with trustees to secure payment of certain obligations and agreed to pay the necessary expenses incurred by the trustees in execution of the trust. The trust company became insolvent and the trustees filed claims for past and future expenses. It was held: "The insolvency proceedings disabled the defendants from performing the executory portions of their agreements in respect to these expenses, and the trustees are entitled to an allowance of reasonable damages for the breaches of contract thus occasioned." *Bank Commissioners* v. *Trust Co.*, 69 N. H. 621, 623.

The opinion of the Circuit Court of Appeals in the case at bar properly applied the doctrine of *Rochm* v. *Horst*. "The Club by its duly authorized officer, informed the Company that it was insolvent and would pay nothing; that it (the Company) must look to its lien to support its claim." *Record*, *p.* 70. Accordingly the Company abandoned the

undertaking and brought suit upon the contract forthwith. At this time, except for a matter of one thousand dollars, "the whole amount reserved by the contract was due and payable." *Record, p.* 62. This amount was $46,748.08 (being the judgment sum in the State courts), and included, with interest, notes of $28,000 which were over due. *Record, p.* 70. "It was determined in the suit in the State court that the sum of $46,748.08 had thus been earned, and was unpaid." *Record, p.* 62. The situation both as a matter of fact and of law entirely warranted the Master's finding that the Club was justified in not proceeding with the work.

The New Hampshire lien statute provides:

> SECTION 10. If a person shall * * perform labor or furnish materials * * for erecting or repairing a house or other buildings by virtue of a contract with the owner thereof, he shall have a lien thereon, and on any right of the owner to the lot of land on which the house, building or appurtenances stand.
>
> * * * * *
>
> SECTION 16. The lien created by sections ten, etc., shall continue for ninety days after the services are performed, or the materials or supplies are furnished, etc.
>
> *Public Statutes,* Chapter 141.

The Company had performed labor and furnished materials "by virtue of a contract with the owner," *i. e.*, the Club, and was properly adjudged a lien in accordance with the statute for an amount determined by the contract itself as a measure of the value of the services performed and materials or supplies furnished. The "damages" were "in the nature of a debt due under the contract." *McCue* v. *Whitwell*, 156 Mass. 206, 207.

The measure of recovery is the contract price, less a deduction for the work undone. The rule is the same wherever the contractor is the righteous party.

3 Sutherland on Damages, *p.* 2179.
2 Sedgwick on Damages, *p.* 1316.
Rockel on Mechanics' Liens, *p.* 127.
Hutt v. *Hickey*, 67 N. H. 411, 417.
Moore v. *Dugan*, 179 Mass. 153.
Sherry v. *Madler*, 123 Wis. 621.
Moore v. *Carter*, 146 Pa. St. 492.
Hall v. *Long*, 68 N. Y. Supp. 951.
McGrathy v. *Horgan*, 76 N. Y. Supp. 412, 415.
Burke v. *Coyne*, 188 Mass. 401, 404.
Norwood v. *Lathrop*, 178 Mass. 208, 210.
McCue v. *Whitwell*, 156 Mass. 205, 207.

The amount earned, payable and unpaid under the contract, determined by deducting from the contract price, the amount it would cost to complete the contract, plus what had been paid under the contract (*Record, pp.* 30, 31), measured very accurately the damages accruing to the Company by the Club's breach of contract. As the contract had been almost completed, the measure of damages for its breach, in an action on the contract, had been worked out correspondingly by the contract itself; the progress of the work automatically measured the damages. The facts of the case leave little room for the application of the principle that "the contract is made the rule of payment, so far as it can be traced" (*Wheeden* v. *Fiske*, 50 N. H. 125, 127), in computing the value of the work undone.

In *Charnley* v. *Honig*, 74 Wis. 163, it is said:

> If the contractor had completed the building according to the contract, no one would

> contend that he was not entitled to a lien if he had not been paid. How can he stand in a different position when he has completed it as far as the defendants would allow him, and he asks for the contract price, less the cost of finishing it. It would allow the defendants to take away from the plaintiff one of his statutory rights by a violation of their contract.

In any view of the case, however, the rule of damages is practically academic. By no conceivable rule would the Company, the righteous party, be entitled to less than the amount due and payable under the contract at the moment the Club breached it. With the entire sum of $205,893 earned except for $1000, it is apparent the variation among the reckonings of damages under any rules, will be *"de minimis,"* and if any reckoning be adverse to the Company in comparison with the rule applied, the Club may not object.

The Club, by its brief to be filed, will doubtless contend as it has hitherto in the various other tribunals contended, that its failure to make payments under the contract, or its insolvency and abandonment of the contract, did not excuse the Company from completing the contract; that to be entitled to a lien, the Company must have gone on after the Club's insolvency and finished the contract in full.

It is safe to assert that this position does not represent the law of the case, never did and never will. In effect it is an assertion that in the event of the owner's insolvency, the contractor to protect himself must continue to increase the debt to the full amount of the contract; that the contractor must perhaps make the plight of the other creditors and his own as well, very likely, worse; for the completed structure may be without market value, or be worth less than cost.

The theory of a builder's lien is equitable; he who creates the tangible value is entitled to its security for his debt. If the owner be solvent, the lien is of course, of no practical benefit; it is only valuable in cases of insolvency. To contend that where the owner becomes insolvent before the contract is completed, the contractor shall realize no lien although the law will give him a right of recovery for what he has done, either in an action on the contract or by *quantum meruit*, is to ignore the fundamental theory of a lien.

As a general proposition the laws relating to the enforcement of liens are given a liberal construction. *Trask* v. *Searle*, 121 Mass. 229; *Shaw* v. *Young*, 87 Me. 271; *Durling* v. *Gould*, 83 Me. 134; 20 Am. & Eng. Ency. of Law (2d ed.) 277, 373. This tendency is approved in the Federal courts. "The laws giving this class of lien should be liberally construed, so as to secure rights intended to be preserved;" *Morgan* v. *First Nat. Bank*, 145 Fed. 466, 472.

The logic of the Club's contention would place it in the owner's power, by refusing the contractor the opportunity to complete, to deprive the latter of any claim to a lien. It is perfectly obvious that the right to a lien does not and can not properly depend upon any act of the owner; given work done under a contract with the owner, the right to a lien must depend upon the good faith of the contractor if he comply with the technical requirements of the lien statute. If he complete the contract, or substantially do so in good faith; if he is able and willing to complete but is not permitted to do so by interference of the owner or the latter's insolvency or renunciation, none the less in any of these events he is entitled to his lien for the work done under the contract, either in an action on the contract or on a *quantum meruit*. Such is the law.

In short it may be stated as a general doctrine that wherever the contractor is justified in ceasing performance of an uncompleted executory contract, by reason of the owner's interference, failure to make payments, waiver, renunciation or repudiation of the contract, bankruptcy or voluntary disablement, he may cease work and at once bring an action either on the contract for damages or *indebitatus assumpsit* for the value rendered. In either event he is entitled to a lien judgment.

Freeto v. *Houghton*, 58 N. H. 100.
Howes v. *Reliance Wire Works Co.*, 46 Minn. 44.
Knight v. *Norris*, 13 Minn. 473.
Dennistoun v. *McAllister*, 4 E. D. Smith 729. (N. Y.).
Burke v. *Coyne*, 188 Mass. 401.
Smith v. *Wetmore*, 167 N. Y. 234, 239.
Brady v. *Oliver*, 125 Tenn. 595.
Baker v. *Waldron*, 92 Me. 17.
Woolf v. *Shaefer*, 103 App. Div. 567. (N. Y.)
Hall v. *Long*, 68 N. Y. Supp. 522.
Huetter v. *Redhead*, 31 Wash. 320.
McCue v. *Whitwell*, 136 Mass. 205.
Federal Trust Co. v. *Gingues*, 76 N. J. Eq. 495, 502.
South Fork Canal Co. v. *Gordon*, 6 Wall. 561.
Anderson v. McDonald, 31 Wash. 274.

3. The Club Waived Absolute Completion.

In the ultimate analysis, back of any question of substantial completion, or neglect to complete, default in payments due, or any one of the varied technicalities hitherto vainly offered by the Club in the various tribunals, lies the determinative fact, that Miller has been found to be "for the purposes

of this case, practically the corporation" (Club). *Record, p.* 69. And the Club, by Miller, deliberately, advisedly and in good faith (*Record, p.* 44) waived full completion of the contract, and informed the Company it must look to its lien to support its claim." *Record, p.* 70.

Legally then, the Company *did* complete the contract by the work done. Waiver of completion is a question of fact (*Danforth* v. *Freeman*, 69 N. H. 467; *Fuller* v. *Brown*, 67 N. H. 188) and that Miller *did* waive completion of this contract is found as a fact by the State Superior Court, the Federal Master and the Circuit Court of Appeals.

SUMMARY.

It is respectfully submitted that the Club has had its day in court, yea, in many courts; that all questions of fact have been fairly determined against it; that all questions of law which it has raised have again and again properly been held adversely to it. Miller *was* the Club; he, as the Club, waived completion of the contract; payments were due and unpaid under the contract; the Club was insolvent; it abandoned the contract and repudiated it. The Company justly and properly has prevailed. This appeal should be dismissed and the judgment of the Circuit Court of Appeals be affirmed. In equity and in law the Company is entitled to the lien judgment awarded it by the courts of New Hampshire nearly seven years ago.

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